Supreme Court, U.S.
FILED
DEC 31 2003
OFFICE OF THE CLERK

(14)

No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

PATRICK LYNCH
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, CA 90071-2899
(213) 430-6000

Counsel for Respondent

SETH P. WAXMAN
Counsel of Record
JONATHAN E. NUECHTERLEIN
JONATHAN H. SIEGELBAUM
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Petitioner

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

PETITION FOR CERTIORARI FILED OCTOBER 11, 2002
CERTIORARI GRANTED NOVEMBER 10, 2003

JONATHAN D. HACKER
O'MELVENY & MYERS
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Respondent

JOSEPH KATTAN
GIBSON, DUNN &
CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

JAMES A. MURRAY
INTEL CORPORATION
2200 Mission College Blvd.,
SC4-202
Santa Clara, CA 95052-8119
(408) 653-5370

Counsel for Petitioner

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GENERAL DOCKET
US Court of Appeals for the Ninth Circuit
02-15070 Advanced Micro v. Intel Corporation, et al

1/16/02	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): NO. setting schedule as follows: appellant's designation of RT is due 1/22/02; appellee's designation of RT is due 1/31/02; appellant shall order transcript by 2/11/02; court reporter shall file transcript in DC by 3/13/02; certificate of record shall be filed by 3/20/02; appellant's opening brief is due 4/29/02; appellees' brief is due 5/29/02; appellants' reply brief is due 6/12/02; [02-15070] (mhf)
1/16/02	Filed attorney for Appellant Civil Appeals Docketing Statement served on 1/10/02 (to CONFATT) [02-15070] [02-15070] (mhf)
1/18/02	Filed certificate of record on appeal RT filed in DC 1/16/02 [02-15070] (gail)
2/4/02	Filed original and 15 copies Appellant Advanced Micro opening brief (Informal: no) 22 pages and five excerpts of record in 03 volumes; served on 2/1/02 [02-15070] (gail)
2/7/02	Filed motion & order: (Deputy Clerk: cb/PROMO) Aplt's motion to expedite is granted. The answering brief is now due March 4, 2002. The answering brief shall be served personally or by overnight mail. The reply brief is due March 11, 2002. This appeal shall be placed on the next available calendar after the completion of briefing. (Motion recvd 2/4/02) [02-15070] (vt)
2/22/02	Case rejected from Circuit Mediation Program. (sa)

3/4/02	Filed original and 15 copies appellee Intel Corporation's 30 pages brief, 01 Supp'l Exc. Vols:; served on 3/4/02 [02-15070] (gail)
3/7/02	Calendar check performed [02-15070] (mw)
3/12/02	Filed original and 15 copies Advanced Micro reply brief, (Informal: no) 18 pages; served on 3/8/02 [02-15070] (gail)
3/12/02	Calendar check performed [02-15070] (aw)
3/12/02	Calendar materials being prepared. [02-15070] [02-15070] (aw)
3/20/02	Calendar materials being prepared. [02-15070] [02-15070] (mm)
3/25/02	CALENDARED: SAN FRAN May 15 2002 9:00 am Courtroom 2 * moved to Ctrm 1 *** [02-15070] (aw)
5/8/02	Filed notice of appearance of Robert E. Cooper for Aple Intel Corporation [02-15070] (gail)
5/15/02	ARGUED AND SUBMITTED TO Michael D. HAWKINS, Barry G. SILVERMAN, Jane A. Restani. [02-15070] (rc)
6/6/02	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Michael D. HAWKINS, author; Barry G. SILVERMAN; Jane A. Restani.) FILED AND ENTERED JUDGMENT. [02-15070] (gail)
6/17/02	Filed Appellant Advanced Micro bill of costs, served on 6/14/02 ($1,833.75) [02-15070] (gail)
6/20/02	[4462529] Filed original and 50 copies Appellee Intel Corporation petition for panel rehearing and petition for rehearing en banc 18 p.pages. served on 6/20/02 PANEL AND

ALL ACTIVE JUDGES [02-15070] (gail)

6/28/02 Filed Appellant Advanced Micro's motion to expedite issuance of mandate and lift stay of mandate pending consideration of petition for rehearing; served on 6/25/02 [4469547] (to PANEL) [02-15070] (hh)

7/5/02 Filed order (Michael D. HAWKINS, Barry G. SILVERMAN, Jane A. Restani,): Petr-aplt shall file a response, not exceeding 15 pages in length, to resp-aple's petition for rehearing or rehearing en banc. 50 copies of the response shall be filed within 21 days of the filed date of this order. [02-15070] (hh)

7/8/02 Filed Appellee Intel Corporation's opposition to aplt's motion to expedite issuance of mandate and lift stay of mandate pending consideration of petition for rehearing [4469547-1]; served on 7/8/02 (to PANEL) [02-15070] (hh)

7/22/02 Filed Appellant Advanced Micro's original and 50 copies of the response opposing petition for enbanc rehearing, 12 pages [4462529-1] served 7/19/02, pursuant to order of 07/05/02 (PANEL AND ALL ACTIVE JUDGES) (sm)

7/29/02 Filed order (Michael D. HAWKINS, Barry G. SILVERMAN, Jane A. Restani): Appellant's motion to expedite issuance of mandate and lift stay of mandate pending consideration of petition for rehearing is DENIED. [4469547-1] [02-15070] (sm)

9/3/02 Filed order (Michael D. HAWKINS, Barry G. SILVERMAN, Jane A. Restani,): ...The petition for rehearing and the petition for rehearing en banc are DENIED. [02-15070] (hh)

9/4/02 Filed Intel Corporation motion to stay the

	mandate pending filing and disposition of certiorari [02-15070] served on 9/4/02 [4522376] FAXED PANEL (em)
9/12/02	Filed Appellant Advanced Micro response opposing appellee's motion to stay the mandate [4522376-1] served on 9/9/02 (PANEL by fax) [02-15070] (dg)
9/16/02	Filed Appellee Intel Corporation's reply in support of motion to stay issuance of the mandate [4522376-1]; served on 9/16/02 (faxed to PANEL) [02-15070] (hh)
9/24/02	Filed order (Michael D. HAWKINS, Barry G. SILVERMAN and Jane A. Restani): The motion of Intel Corporation to stay issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari is DENIED. The mandate shall issue forthwith. [02-15070] (sm)
9/24/02	MANDATE ISSUED; COSTS TAXED in the amount of $1833.75. [02-15070] (sm)
10/23/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-572 filed on 10/11/02. [02-15070] (hh)
11/14/03	Received notice from Supreme Court, petition for certiorari GRANTED on 11/10/03 Supreme Court No. 2-572 (PANEL) (ji)

U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(SAN JOSE)

CIVIL DOCKET FOR CASE #: O1-MC-7033

ADVANCED MICRO DEVICES
V.
INTEL CORPORATION

Filed: 10/01/01
Assigned to: Judge James Ware
Referred to: Judge Howard R. Lloyd
Demand: $0,000
Nature of Suit: 0
Lead Docket: None
Jurisdiction: unknown
Dkt # in USDC Alabama: is CV97-N-3023-NE

ADVANCED MICRO DEVICES, INC. Petitioner	Patrick Lynch [COR LD NTC] David I. Hurwitz [COR LD NTC] O'Melveny & Myers LLP 400 South Hope Street Los Angeles, CA 90071-28999 (213) 430-6000
v.	
INTEL CORPORATION, Respondent	Joseph Kattan [COR LD NTC] Gibson Dunn & Crutcher LLP 333 South Grand Ave Los Angeles, CA 90071-3197 (213) 229-7000

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
10/1/01	1	AMD'S application for order directing Intel to produce documents Miscellaneous Civil Case receipt # 10545. (vm) [Entry date 10/09/01] [Edit date 10/09/01]
10/4/01	2	NOTICE OF MOTION, APPLICATION FOR ORDER directing Intel to produce documents before Judge William A. Ingram by Advanced Micro Devic memorandum of points and authorities with Notice set for November 12, 2001, 2:00 p.m. (vm) [Entry date 10/09/01]
10/4/01	--	RECEIVED Proposed Order (Petitioner Advanced Micro Devic) re: motion memorandum of points and authorities [2-1] (vm) [Entry date 10/09/01]
10/4/01	3	DECLARATION by Patrick Lynch on behalf of Advanced Micro Devices in support of re motion and application with memorandum of points and authorities directing Intel to produce documents [2-1] (vm) [Entry date 10/09/01]
10/4/01	4	DECLARATION by Ingo Brinker on behalf of Advanced Micro Devic in support of AMD'S re motion and application with memorandum of points and authorities directing Intel to produce documents [2-1] (vm) [Entry date 10/09/01]

10/4/01	5	DECLARATION by Jeffrey Mackie-Masor on behalf of Petitioner Advanced Micro Devices in support of AMD's re motion and application for order, with memorandum of points and authorities to produce documents [2-1] (vm) [Entry date 10/09/01]
10/4/01	6	PROOF OF SERVICE by Advanced Micro Devic of declaration [5-1], declaration [4-1], declaration [3-1], order received [0-0], motion memorandum of points and authorities [2-1], [1-1] (vm) [Entry date 10/09/01]
10/16/01	7	APPLICATION before Judge William A. Ingram by Intel Corporation for attorney to appear pro hac vice. Fee status pd. #5503858 (vm) [Entry date 10/17/01]
10/16/01	--	RECEIVED Proposed Order (Intel Corporation) re: motion for attorney to appear pro hac vice. Fee status pd. #5503858 [7-11] (vm) [Entry date 10/17/01]
10/17/01	8	ORDER by Judge William A. Ingram granting order received [0-0], granting motion for attorney to appear pro hac vice. Fee status pd. #5503858 [7-1] (Date Entered: 10/17/01) (cc: all counsel) (vm)
10/18/01	9	STIPULATION and ORDER by Judge William A. Ingram: granting continuing hearing on AMD's application for order directing Intel to produce documents (cc: all counsel) (vm) [Entry date 10/23/01]
10/29/01	--	RECEIVED Proposed Order (Intel Corporation) denying Advanced Micro Devices' re: application for Discovery [2-1] (vm) [Entry date 10/30/01]

10/29/01	10	OPPOSITION by Intel Corporation to application for order [2-1] (vm) [Entry date 10/30/01]
10/29/01	11	DECLARATION by James F. Rill on behalf of Intel Corporation in support of Intel Corporation's opposition to Advanced Micro Devices' application for order (vm) [Entry date 10/30/01]
10/29/01	12	DECLARATION by Dr. Nigel Parr on behalf of Intel Corporation re opposition [10-1] (vm) [Entry date 10/30/01]
10/29/01	13	DECLARATION by Darren B. Bernhard on behalf of Intel Corporation re opposition [10-1] (vm) [Entry date 10/30/01]
10/29/01	14	PROOF OF SERVICE by Intel Corporation of declaration [13-1], declaration [12-1], declaration [11-1], opposition [10-1], order received [0-0] (vm) [Entry date 10/30/01]
11/5/01	15	REPLY by Advanced Micro Devic re opposition [10-1] (vm) [Entry date 11/07/01]
11/13/01	16	CLERK'S NOTICE for hearing previously set for November 19, 2001 will be heard on the new time Hearing will be set on Monday, December 10, 2001 at 2:00 p.m. (vm) [Entry date 11/14/01]
11/20/01	--	STIPULATION AND RECEIVED Proposed Order (Intel Corporation) re: clerk notice [16-2] to reset the hearing date on AMD's application for order directing Intel to produce documents (vm)
11/20/01	--	STIPULATION AND RECEIVED Proposed Order (Advanced Micro Devic) re: clerk notice [16-2] to reset the hearing date on AMD's application for order directing Intel to produce documents. (vm) [Entry date 11/21/01]

12/10/01	18	MINUTES: (C/R Irene Rodriguez) (Hearing Date: 12/6/01) that the motion for order directing INTEL to produce documents [2-1] is submitted (dhm) [Entry date 12/13/01]
12/11/01	17	ORDER by Judge William A. Ingram denying order received [0-0] (Date Entered: 12/12/01) (cc: all counsel) (vm) [Entry date 12/12/01]
1/7/02	19	MEMORANDUM OF DECISION by Judge William A. Ingram denying [1-1] (Date Entered: 1/8/02) (cc: all counsel) (vm) [Entry date 01/08/02]
1/11/02	20	NOTICE OF APPEAL by Advanced Micro Devic from Dist. Court decision order [17-1] December 12, 2001 denying AMD's Application. Fee status paid $105.00 receipt #5504475 (vm)
1/11/02	--	Docket fee notification form and case information sheet to USCA [20-1] (vm)
1/11/02	--	Copy of notice of appeal and docket sheet to all counsel (vm) [Entry date 01/14/02]
1/16/02	21	REPORTER'S TRANSCRIPT; Date of proceedings: 12/6/01 (C/R: I. Rodriguez) minutes [18-1] (cv) [Entry date 01/17/02]
1/17/02	--	CERTIFICATE of Record mailed to USCA, counsel notified. (cv)
1/17/02	--	NOTIFICATION by Circuit Court of Appellate Docket Number 02-15070 (vm) [Entry date 01/22/02]
1/18/02	22	TRANSCRIPT DESIGNATION and Ordering Form filed by Advanced Micro Devic for dates December 6, 2001; C/R: Irene Rodriguez; appeal [20-1] (vm) [Entry date 01/22/02]
1/22/02	23	PROOF OF SERVICE by Advanced Micro Devic of appeal [20-1] and United States Court of Appeals for the Ninth Cir-

		cuit Civil Appeals Docketing Statement (vm) [Entry date 01/28/02]
4/8/02	--	RECORD on Appeal to USCA Cnsl, notified. re appeal [20-1] (vm)
6/28/02	24	ORDER by Chief Judge Marilyn H. Patel Case reassigned to Judge James Ware referred to Judge James Ware the motion memorandum of points and authorities [2-1] () (cc: all counsel) (cv) [Entry date 07/02/02]
7/1/02	25	ORDER by Executive Committee Case reassigned to Judge James Ware () (cc: all counsel) (cv) [Entry date 07/02/02]
8/7/02	26	CERTIFIED COPY of USCA Order: Appellant's motion to expedite issuance of mandate and lift stay of mandate pending consideration of petition for rehearing is denied. 1 [20-1] (cv) [Entry date 08/08/02]
9/12/02	--	RECEIVED copy 9th Circuit Opposition to Intel's Motion to Stay Issuance of Mandate submitted by Petitioner Advanced Micro Devic (vm) [Entry date 09/25/02]
9/30/02	27	CERTIFIED COPY of USCA Order: re [20-1] The motion to stay issuance of the mandate pending the filing and disposition of a petition for a Writ of Certiorari is denied. (dhm) [Entry date 10/02/02]
10/02/02	28	NOTICE OF MOTION AND MOTION before Judge James Ware by Petitioner Advanced Micro Devic to remand on its application for order directing production of documents with Notice set for 11/18/02 at 9:00 (cv) [Entry date 10/16/02]
10/11/02	29	NOTICE by Respondent Intel Corporation of application and cross-application of Intel or order. (cv) [Entry date 10/16/02]

10/11/02	--	RECEIVED propoed order submitted by Respondent Intel Corporation (cv) [Entry date 10/16/02]
10/11/02	30	MEMORANDUM by Respondent Intel Corporation in support of notice [29-1] (cv) [Entry date 10/16/02]
10/11/02	31	PROOF OF SERVICE by Respondent Intel Corporation of memorandum [30-1], document received [0-0], notice [29-1] (cv) [Entry date 10/16/02]
10/18/02	32	NOTICE by Respondent Intel Corporation of filing of petition for a writ of certiorari. (cv)
10/18/02	33	PROOF OF SERVICE by Respondent Intel Corporation of notice [32-1] (cv) [Entry date 10/21/02]
10/28/02	34	OPPOSITION by Petitioner Advanced Micro Devic to notice [29-1] (cv) [Entry date 11/08/02]
10/28/02	35	DECLARATION by R. A. Callahan on behalf of Petitioner Advanced Micro Devic re opposition [34-1] (cv) [Entry date 11/08/02]
10/28/02	36	SUPPLEMENT by Respondent Intel Corporation opposition to AMD application for order directing production of documents, (cv) [Entry date 11/08/02]
10/28/02	37	PROOF OF SERVICE by Respondent Intel Corporation of [36-1], declaration [35-1] (cv) [Entry date 11/08/02]
11/4/02	38	REPLY by Petitioner Advanced Micro Devic re motion to remand on its application for order directing production of documents [28-1] (cv) [Entry date 11/08/02]

11/4/02	39	PROOF OF SERVICE by Respondent Intel Corporation of notice [29-1] (cv) [Entry date 11/08/02]
11/4/02	40	REPLY by Respondent Intel Corporation re notice [29-1] (cv) [Entry date 11/08/02]
11/7/02	41	CERTIFIED COPY of USCA Order: reversing and remanding the Decision of the District Court [Appeal [20-1]; Bill of Costs Attached in the amount of $1,833.75 (cv) [Entry date 11/08/02]
11/8/02	42	CLERK's letter spreading the mandate to counsel. re appeal [20-1] (cv)
11/15/02	43	CLERK'S NOTICE setting hearing on motion to remand on its application for order directing production of documents [28-1] 10:00 12/17/02 (cv) [Entry date 11/19/02]
11/18/02	44	NOTICE by Respondent Intel Corporation of filing amicus briefs (cv) [Entry date 11/19/02]
11/18/02	45	PROOF OF SERVICE by Respondent Intel Corporation of notice [44-1] (cv) [Entry date 11/19/02]
11/19/02	46	ORDER by Judge James Ware referring case for discovery to Judge Howard R. Lloyd referring to Judge Howard R. Lloyd the motion to remand on its application for order directing production of documents [28-1], (Date Entered: 11/20/02) (cc: all counsel) (cv) [Entry date 11/20/02]
11/19/02	47	ORDER by Judge Howard R. Lloyd Parties to meet and confer to attempt to resolve their discovery disagreements. They shall file by 12/10/02 a joint report detailing any unresolved requests. (Date Entered: 11/20/02) (cc: all counsel) (cv) [Entry date 11/20/02]

11/20/02	49	NOTICE by Respondent Intel Corporation of sugfestion [sic] for further proceedings on pending application . (cv) [Entry date 11/22/02]
11/20/02	50	PROOF OF SERVICE by Respondent Intel Corporation of notice [49-1] (cv) [Entry date 11/22/02]
11/21/02	48	RECORD ON APPEAL RETURNED FROM USCA [20-1] (cv)
12/3/02	51	LETTER dated 12/3/02 from R E. Cooper re: this Court is required to determine discovery requests. (cv) [Entry date 12/10/02]
12/3/02	52	PROOF OF SERVICE by Respondent Intel Corporation of letter [51-1] (cv) [Entry date 12/10/02]
12/4/02	53	NOTICE by Respondent Intel Corporation of errata re: respondent letter brief dated 12/3/02. (cv) [Entry date 12/10/02]
12/4/02	54	PROOF OF SERVICE by Respondent Intel Corporation of notice [53-1] (cv) [Entry date 12/10/02]
12/10/02	55	JOINDER by Petitioner Advanced Micro Devic, Respondent Intel Corporation of report on meeting to resolve discovery issues. (cv) [Entry date 12/11/02]
12/11/02	56	ORDER by Judge Howard R. Lloyd In court hearing will be held 10:00 1/10/03; (Date Entered: 12/13/02) (cc: all counsel) (cv) [Entry date 12/13/02]
12/19/02	57	LETTER dated 12/19/02 from Intel Corporation re: Supreme Court is likely to announce its disposition of Intel's petition for certiorari on 1/13/03. (cv)
12/19/02	58	PROOF OF SERVICE by Respondent Intel Corporation of letter [57-1] (cv)

12/23/02	59	REPLY by Respondent Intel Corporation in support of its petition for writ of certiorari filed with the this Court on 10/18/02. (cv) [Entry date 12/24/02]
12/23/02	60	PROOF OF SERVICE by Respondent Intel Corporation of reply [59-1] (cv) [Entry date 12/24/02]
12/31/02	61	AMENDED MOTION before Judge Howard R. Lloyd by Petitioner Advanced Micro Devic to produce documents with Notice set for 1/10/03 at 10:00 (cv) [Entry date 01/03/03]
12/31/02	62	NOTICE of hearing by Petitioner Advanced Micro Devic setting motion to produce documents [61-1]; hearing set for 10:00 1/10/03 (cv) [Entry date 01/03/03]
12/31/02	63	DECLARATION by P. Lynch on behalf of Petitioner Advanced Micro Devic re motion to produce documents [61-1] (cv) [Entry date 01/03/03]
12/31/02	--	RECEIVED proposed order submitted by Petitioner Advanced Micro Devic (cv) [Entry date 01/03/03]
1/7/03	64	OPPOSITION by Respondent Intel Corporation to motion to produce documents [61-1] (cv)
1/7/03	65	OPPOSITION by Respondent Intel Corporation to motion notice [62-1] /application for order to 28 USC 1782. (cv)
1/7/03	66	PROOF OF SERVICE by Respondent Intel Corporation of opposition [65-1], opposition [64-1] [cv)
1/9/03	67	REPLY by Petitioner Advanced Micro Devic re motion to produce documents [61-1] (cv)
1/10/03	68	MINUTES: (C/R tape) (Hearing Date: 1/10/03) that the motion to produce docu-

		ments [61-1] is submitted (cv) [Entry date 01/13/03]
1/13/03	69	LETTER dated 1/13/03 from Joseph Kattan re: of Order List which contains the invitation is attached to this letter. (cv) [Entry date 01/16/03]
1/13/03	70	PROOF OF SERVICE of letter [69-1] (cv) [Entry date 01/16/03]
1/22/03	71	ORDER by Judge Howard R. Lloyd granting in part AMD'S amended application re motion to produce documents [61-1] (Date Entered: 1/23/03) (cc: all counsel) (cv) [Entry date 01/23/03]
2/5/03	72	NOTICE OF MOTION AND MOTION WITH MEMORANDUM OF POINTS AND AUTHORITIES before Judge James Ware by Respondent Intel Corporation for order of De Novo determination of AMD amended aplication & Intel's cross-application; objections to Mag Judge's recommended decision and memo with Notice set for 3/17/03 at 9:00 (cv)
2/5/03	73	PROOF OF SERVICE by Respondent Intel Corporation of motion for order of De Novo determination of AMD amended aplication [sic] & Intel's cross-application; objections to Mag Judge's recommended decision and memo. [72-1] (cv)
2/5/03	--	RECEIVED stip & order (cv) [Entry date 02/06/03]
2/10/03	74	STIPULATION and ORDER by Judge Howard R. Lloyd: for protective order with addendum (cc: all counsel) (cv) [Entry date 02/11/03]

2/10/03	75	REPORTER'S TRANSCRIPT; Date of proceedings: 1/10/03 (C/R: electronic recording) minutes [68-1] (cv) [Entry date 02/11/03]
2/24/03	76	OPPOSITION by Petitioner Advanced Micro Devic to motion for order of De Novo determination of AMD amended aplication & Intel's cross-application; objections to Mag Judge's recommended decision and memo. [72-1] (cv) [Entry date 02/25/03]
3/3/03	77	REPLY by Respondent Intel Corporation re motion for order of De Novo determination of AMD amended aplication & Intel's cross-application; objections to Mag Judge's recommended decision and memo. [72-1] (cv) [Entry date 03/04/03]
3/3/03	78	PROOF OF SERVICE by Respondent Intel Corporation of reply [77-1] (cv) [Entry date 03/04/03]
3/6/03	79	ORDER VACATING 3/17/03 HEARING DATE by Judge James Ware setting hearing on motion for order of De Novo determination of AMD amended application & Intel's cross-application; objections to Mag Judge's recommended decision and memo. [72-1] tentatively reset to 9:00 7/14/03; The parties shall immediately inform the Court once the Supreme Court has ruled on Intel's petition. (Date Entered: 3/7/03) (cc: all counsel) (cv) [Entry date 03/07/03] [Edit date 06/23/03]
6/26/03	80	MEMORANDUM by Petitioner Advanced Micro Devic in support of request for hearing on Intel's appeal from order allowing discovery. (cv)

7/3/03	81	OPPOSITION by Respondent Intel Corporation to memorandum [80-1] (cv) [Entry date 07/10/03]
7/7/03	82	LETTER dated 7/7/03 from Robert Cooper re: opposition to AMD's request for hearing. (cv) [Entry date 07/10/03]
7/11/03	83	ORDER by Judge James Ware setting hearing on motion for order of De Novo determination of AMD amended aplication [sic] & Intel's cross-application; objections to Mag Judge's recommended decision and memo. [72-1] 9:00 10/20/03 (Date Entered: 7/11/03) (cc: all counsel) (cv)
10/6/03	84	NOTICE by Respondent Intel Corporation of filing Solicitor General's amicus brief and suggestion of respondent intel corp., for resetting of hearing date. (cv) [Entry date 10/07/03]
10/15/03	85	ORDER by Judge James Ware In court hearing will be held 9:00 12/1/03; and inform the Court once Supreme Court has ruled on Intel's petition. (Date Entered: 10/15/03) (cc: all counsel) (cv)
12/1/03	86	ORDER by Judge James Ware re: Vacating hearing date. (Date Entered: 12/2/03) (cc: all counsel) (cv) [Entry date 12/02/03]

COMMISSION DECISION

of 23 May 2001

on the terms of reference of hearing officers in certain competition proceedings

(notified under document number C(2001) 1461)

(Text with EEA relevance)

(2001/462/EC, ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to the Agreement on the European Economic Area,

Having regard to the Rules of Procedure of the Commission [1], and in particular Article 20 thereof.

Whereas:

(1) The right of the parties concerned and of third parties to be heard before a final decision affecting their interests is taken is a fundamental principle of Community law. That right is also set out in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [2], as last amended by Regulation (EC) No 1310/97 [3], Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in cer-

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[1] OJ L 308, 8.12.2000, p. 26

[2] OJ L 395, 30.12.1989, p. 1 (corrected version in OJ L 257, 21.9.1990, p. 13)

[3] OJ L 180, 9.7.1997, p.1.

tain proceedings under Articles 85 and 86 of the EC Treaty ([4]) and Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings ([5]).

(2) The Commission must ensure that that right is guaranteed in its competition proceedings, having regard in particular to the Charter of Fundamental Rights of the European Union ([6]).

(3) The conduct of administrative proceedings should therefore be entrusted to an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings.

(4) The Commission created the post of hearing officer for these purposes in 1982 and last laid down the terms of reference for that post in Commission Decision 94/810/ ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission ([7]).

(5) It is necessary to further strengthen the role of the hearing officer and to adapt and consolidate those terms of reference in the light of developments in competition law.

(6) In order to ensure the independence of the hearing officer, he should be attached, for administrative purposes, to the member of the Commission with special responsibility for competition. Transparency as regards the appointment, termination of appointment and transfer of hearing officers should be increased.

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[4] OJ L 354, 30.12.1998, p. 18.

[5] OJ L 61, 2.3.1998, p. 1.

[6] OJ C 364, 18.12.2000, p.1.

[7] OJ L 330, 21.12.1994, p. 67.

(7) The hearing officer should be appointed in accordance with the rules laid down in the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities. In accordance with those rules, consideration may be given to candidates who are not officials of the Commission.

(8) The terms of reference of the hearing officer in competition proceedings should be framed in such a way as to safeguard the right to be heard throughout the whole procedure.

(9) When disclosing information on natural persons, particular attention should be paid to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [8].

(10) This Decision should be without prejudice to the general rules granting or excluding access to Commission documents.

(11) Decision 94/810/ECSC, EC should be repealed.

HAS DECIDED AS FOLLOWS:

Article 1

The Commission shall appoint one or more hearing officers (hereinafter 'the hearing officer'), who shall ensure that the effective exercise of the right to be heard is respected in competition proceedings before the Commission under Articles 81 and 82 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty, and Regulation (EEC) No 4064/89.

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[8] OJ L 8, 12.1.2001, p.1.

Article 2

1. The appointment of the hearing officer shall be published in the *Official Journal of the European Communities*. Any interruption, termination of appointment or transfer by whatever procedure, shall be the subject of a reasoned decision of the Commission. That decision shall be published in the *Official Journal of the European Communities*.

2. The hearing officer shall be attached, for administrative purposes, to the member of the Commission with special responsibility for competition (hereinafter 'the competent member of the Commission').

3. Where the hearing officer is unable to act, the competent member of the Commission, where appropriate after consultation of the hearing officer, shall designate another official, who is not involved in the case in question, to carry out the hearing officer's duties.

Article 3

1. In performing his duties, the hearing officer shall take account of the need for effective application of the competition rules in accordance with the Community legislation in force and the principles laid down by the Court of Justice and the Court of First Instance of the European Communities.

2. The hearing officer shall be kept informed by the director responsible for investigating the case (hereinafter 'the director responsible') about the development of the procedure up to the stage of the draft decision to be submitted to the competent member of the Commission.

3. The hearing officer may present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission.

Article 4

1. The hearing officer shall organise and conduct the hearings provided for in the provisions implementing Articles 81 and 82 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Regulation (EEC) No 4064/89, in accordance with Articles 5 to 13 of this Decision.

2. The provisions referred to in paragraph 1 are:

(a) the first paragraph of Article 36 of the ECSC Treaty;

(b) Regulation (EC) No 2842/98;

(c) Regulation (EC) No 447/98.

Article 5

The hearing officer shall ensure that the hearing is properly conducted and contributes to the objectivity of the hearing itself and of any decision taken subsequently. The hearing officer shall seek to ensure in particular that, in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned including the factual elements related to the gravity of any infringement.

Article 6

1. Applications to be heard from third parties, be they persons, undertakings or associations of persons or undertakings, shall be submitted in writing, together with a written statement explaining the applicant's interest in the outcome of the procedure.

2. Decisions as to whether third parties are to be heard shall be taken after consulting the director responsible.

3. Where it is found that an application has not shown a sufficient interest to be heard, he shall be informed in writing of the reasons for such finding. A time limit shall be fixed within which he may submit any further written comments.

Article 7

1. Applications to be heard orally shall be made in the applicant's written comments on letters which the Commission has addressed to him.

2. The letters referred to in paragraph 1 are those:

(a) communicating a statement of objections;

(b) inviting the written comments of a third party having shown sufficient interest to be heard;

(c) informing a complainant that in the Commission's view there are insufficient grounds for finding an infringe-

ment and inviting him to submit any further written comments.

3. Decisions as to whether applicants are to be heard orally shall be after consulting the director responsible.

Article 8

1. Where a person, an undertaing [sic] or an association of persons or undertakings has received one or more of the letters listed in Article 7(2) and has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of the right to be heard, access to those documents may be sought by means of a reasoned request.

2. The reasoned decision on any such request shall be communicated to the person, undertaking or association that made the request and to any other person, undertaking or association concerned by the procedure.

Article 9

Where it is intended to disclose information which may constitute a business secret of an undertaking, it shall be informed in writing of this intention and the reasons for it. A time limit shall be fixed within which the undertaking concerned may submit any written comments.

Where the undertaking concerned objects to the disclosure of the information but it is found that the information is not protected and may therefore be disclosed, that finding shall be stated in a reasoned decision which shall be notified to the undertaking concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than one week from the date of notification.

The first and second paragraphs shall apply *mutatis mutandis* to the disclosure of information by publication in the *Official Journal of the European Communities*.

Article 10

Where a person, undertaking or association of persons or undertakings considers that the time limit imposed for its

reply to a letter referred to in Article 7(2) is too short, it may, within the original time limit, seek an extension of that time limit by means of a reasoned request. The applicant shall be informed in writing whether the request has been granted.

Article 11

Where appropriate, in view of the need to ensure that the hearing is properly prepared and particularly that questions of fact are clarified as far as possible, the hearing officer may, after consulting the director responsible, supply in advance to the parties invited to the hearing a list of the questions on which he wishes them to make known their views.

For this purpose, after consulting the director responsible, the hearing officer may hold a meeting with the parties invited to the hearing and, where appropriate, the Commission staff, in order to prepare for the hearing itself.

The hearing officer may also ask for prior written notification of the essential contents of the intended statement of persons whom the parties invited to the hearing have proposed for hearing itself.

The hearing officer may also ask for piror written notification of the essential contents of the intended statement of persons whom the parties invited to the hearing have proposed for hearing.

Article 12

1. After consulting the director responsible, the hearing officer shall determine the date, the duration and the place of the hearing. Where a postponement is requested, the hearing officer shall decide whether or not to allow it.

2. The hearing officer shall be fully responsible for the conduct of the hearing.

3. The hearing officer shall decide whether fresh documents should be admitted during the hearing, what persons should be heard on behalf of a party and whether the persons concerned should be heard separately or in the presence of other persons attending the hearing.

4. Where appropriate, in view of the need to ensure the right to be heard, the hearing officer may, after consulting the Director responsible, afford persons, undertakings, and associations of persons or undertakings the opportunity of submitting further written comments after the oral hearing. The hearing officer shall fix a date by which such submissions may be made. The Commission shall not be obliged to take into account written comments received after that date.

Article 13

1. The hearing officer shall report to the competent member of the Commission on the hearing and the conclusions he draws from it, with regard to the respect of the right to be heard. The observations in this report shall concern procedural issues, including disclosure of documents and access to the file, time limits for replying to the statement of objections and the proper conduct of the oral hearing.

A copy of the report shall be given to the Director-General for Competition and to the director responsible.

2. In addition to the report referred to in paragraph 1, the hearing officer may make observations on the further progress of the proceedings. Such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections.

Article 14

Where appropriate, the hearing officer may report on the objectivity of any enquiry conducted in order to assess the competition impact of commitments proposed in relation to any proceeding initiated by the Commission in application of the provisions referred to in Article 1. This shall cover in particular the selection of respondents and the methodology used.

Article 15

The hearing officer shall, on the basis of the draft decision to be submitted to the Advisory Committee in the case in question, prepare a final report in writing on the respect of the

right to be heard, as referred to in Article 13(1). This report will also consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views, and, where appropriate, the objectivity of any enquiry within the meaning of Article 14.

The final report shall be submitted to the competent member of the Commission, the Director-General for Competition and the director responsible. It shall be communicated to the competent authorities of the Member States and, in accordance with the provisions on cooperation laid down in Protocol 23 and Protocol 24 of the EEA Agreement, to the EFTA Surveillance Authority.

Article 16

1. The hearing officer's final report shall be attached to the draft decision submitted to the Commission, in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information as regards the course of the procedure and respect of the right to be heard.

2. The final report may be modified by the hearing officer in the light of any amendments to the draft decision up to the time the decision is adopted by the Commission.

3. The Commission shall communicate the hearing officer's final report, together with the decision, to the addressees of the decision. It shall publish the hearing officer's final report in the *Official Journal of the European Communities*, together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 17

Decision 94/810/ECSC, EC is repealed.

Procedural steps already taken under that Decision shall continue to have effect.

Done at Brussels, 23 May 2001.

For the Commission

Mario MONTI
Member of the Commission

ELEVENTH REPORT ON COMPETITION POLICY

PART ONE – COMPETITION POLICY TOWARDS ENTERPRISES

Chapter I: Main developments in Community policy

* * * *

§ 3 – Merger control

13. The Commission adopted an amended version of its proposal for a Regulation transmitted to the Council on 20 July 1973; the new proposal is now being examined by Parliament and the Economic and Social Committee. The proposed changes should enable the Council to resume the work suspended since 1978.

The amended proposal deals with two of the political problems mentioned in the Tenth Report on Competition Policy.[1]

Firstly, it defines the conditions for applying the Community rules. In assessing whether a merger is likely to give the firms concerned the power to hinder effective competition, the merger is to be presumed compatible with the common market where the market share of the goods or services concerned in the common market accounts for less than 20% of the turnover in identical or similar goods or services, unless the Commission can prove otherwise.

Secondly, the Member States are to be more closely associated in the Commission's decision-making process prior to any decision on the incompatibility of a merger. Under the amended proposal a Member State may, in certain circumstances, raise an objective in the Council which should

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[1] Tenth report on Competition Policy, point 20.

be considered as having priority over and therefore as justifying derogation from the rules concerning incompatibility.

§ 4 – Commission procedures in implementing the rules of competition

14. Wide-ranging discussion has been going in Parliament and in interested legal and economic circles on the administrative procedures relating to restrictive agreements and practices. On the one hand, there are suggestions for a simplification and acceleration of procedures and on the other, suggestions for increased procedural guarantees which have the effect of prolonging and slowing down the Commission's current procedures.[2]

The Commission takes the view that on the whole the provisions implementing Articles 85 and 86, which are based mainly on Council Regulation No. 17 and Commission Regulation No. 99/63/EEC, have stood the test of time and do not require any substantial amendments. It also considers that in practical application these procedures are fair and that they respect all the principles established by the Court of Justice. However, the Commission fully understands the concerns expressed in business circles and is therefore looking into all possible ways of making improvements, which are compatible with its task of effectively eliminating anti-competitive practices and the need for thorough analysis of the frequently complicated economic background to its decision. The Commission thus aims to allay the principal apprehensions which have emerged in its talks with interested parties, i.e., improved legal certainty for firms and additional guarantees that its assessment of cases handled is objective.

15. Legal certainty for businesses could be substantially increased by the introduction of more rapid exemption procedures, notably in the case of cooperation projects involving substantial investments. The problem now facing the Commission is essentially a practical one. The Commission is exclusively responsible for granting exemptions under Article

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[2] Point 69 of this Report.

85(3) and there are now almost 4,000 applications pending;[3] some 200 new applications are made every year. The majority of these cases fall under the block exemption regulations but many still have to be dealt with individually. The Commission is now examining ways of speeding up the general handling of such cases. It is already working on a system for dealing more efficiently and more rapidly with two types of cases.

As regards cases which at first sight raise no problems with respect to the rules of competition and do not require a formal decision, notably negative clearance, the Commission intends to pursue its policy of closing the case and informing the firms concerned by means of comfort letters. To increase the legal value of these letters, it envisages prior publication of a Notice in the Official Journal, to give interested third parties the opportunity to submit comments.

The Commission proposes to settle cases which obviously satisfy the tests of Article 85(3) by means of simplified exemption decisions, which would solve in particular the problem of the numerous cases having common features.

16. The criticism that objectiveness in procedures is not adequately guaranteed stems in the main from a feeling of insatisfaction with the fact that the Commission holds concurrently powers of investigation, examination and decision.

The investing of such power in a single authority is consistent with the classic rules of administrative law in most Member States. However, they provide for two instances of judicial review which guarantees the parties concerned both certainty as regards the judicial assessment of the substance and the review of lawfulness. At Community level there is no equivalent two-tier judicial review.

However, it can be seen from the judgments of the Court that it has dealt fully not only with questions of law but also with those of fact in actions concerning competition.

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[3] See the judgments of the Court of Justice in the *Perfumes* cases; Tenth Report on Competition Policy, point 50 *et seq.*

The complex nature of any dispute involving economic analyses inevitably increases the Court's workload. The Commission therefore favours the introduction of a two-tier system of judicial review: a court of first instance dealing with questions both of fact and of law, the court of second instance merely re-examining questions of law. The Court itself, moreover, made such a suggestion in 1978. The Commission believes that in future this reform would be the most appropriate way of improving all administrative and legal procedures relating to competition cases.

While endeavouring to maintain a balance between undertakings' individual interest as regards their rights of defence and the general interest in efficacious application of the competition rules, the Commission has taken certain practical steps to reinforce the objectiveness of its procedures, notably by making them more transparent. These measures concern investigations carried out at undertakings, access to the Commission's files and proceedings at oral hearings.

1 – Procedures during inspections

17. Undertakings regard the inspections which the Commission is empowered to undertake under Article 14 of Regulation No. 17 as serious interference in their private sphere of activity. For this reason the Commission intends, within the context of the existing rules, to improve understanding of its action in this connection by assuring firms that the exercise of these powers is strictly lawful, by specifying the scope of their legitimate rights and by guaranteeing that the information thus obtained will be utilized objectively.

18. The purpose of inspections is therefore now defined more precisely than in the past. The degree of precision naturally depends in each case on the value of the information already in the Commission's possession and the stage reached in the enquiries.

This applies both to inspections carried out on the basis of an authorization, in accordance with Article 12(2) of Regulation No. 17 and also to those carried out on the basis of a

formal Commission decision under Article 14(3). Undertakings are thus better able to check for themselves that the information requested is strictly relevant to the object of the inspection and that it is used only for the purpose for which it was requested.

19. The Commission's officials responsible for carrying out inspections have also been instructed to inform the firm concerned of the scope and limits of their powers under Article 14 of Regulation No. 17 and of its rights to consult its legal advisers. Such consultation may not, however, unduly delay the investigation or impede its progress.

20. Finally, with the view to objectiveness, the relevant facts uncovered during inspections whether favourable or unfavourable to the undertakings concerned, are assembled in the report on the inspections and taken into consideration when the Commission decides on its course of action. Since the time available to carry out inspections is inevitably limited, the Commission does, of course, rely on the undertakings concerned to draw its attention to favourable factors which it might not come across.

21. A number of difficulties stem from the fact that Community competition law has no specific rule on 'legal professional privilege'. The Commission does recognize this principle. It accepts that in practice documents seeking or giving legal advice on competition rules or on the defence of a company will not be used as evidence in establishing infringements of the competition rules.[4] The officials authorized by the Commission to carry out inspections have been instructed not to take copies of these documents. Nevertheless, the Commission believes that, subject to review by the Court of Justice, it has the right to decide whether certain documents fall into this category. The Commission is now awaiting the decision of the Court in Case 155/79 *AM & S (Europe) Ltd. v. Commission.*

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[4] Answer to Written Question No. 63/78 by Mr. Cousté: OJ C 188, 7.8.1978.

2 – Access to the Commission's files

22. The right of firms to be heard before any decision is taken against them is guaranteed by the forwarding of the statement of objections and the opportunity of replying in writing and, if necessary, orally.

23. In accordance with the case law of the Court[5] the statement of objections may be restricted to a brief, but clear, description of the facts on which the Commission bases its case, provided that it supplies, in the course of the administrative procedure, the details necessary to the defence. The Commission is not obliged to send the firms concerned all the documents on which its arguments are based; it is sufficient to forward only the documents concerning the essential facts.

The Commission accordingly already gives undertakings the opportunity of commenting on all documents and all factual information which the Commission puts forward against them in its statement of objections in cases where firms submit a request, justified by the need for a better understanding of the file, the Commission does allow them to inspect the documents themselves. The Commission also consistently informs the firms concerned, in so far as possible, of the relevant part of formal complaints.

24. The Commission is even considering going beyond the requirements laid down by the Court and allowing, in principle, firms involved in a procedure to have access to the file on the particular case. However, any such inspection is limited by the Commission's obligation to refrain from disclosing business secrets to other companies and the need to preserve the confidential nature of the Commission's internal or working documents.

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[5] Joined Cases 56 and 58/64 Grundig-Consten [1966] ECR 299; Cases 41, 44 and 45/69 Quinine [1970] ECR 661, 733, 769; Cases 48, 49 and 51/69 *Dyes_ffe* [1972] ECR 619, 711 and 745, Case 85/76 *Hoffman-LaRoche* [1979] ECR 461; Joined Cases 209 to 215 and 218/78TR Federlab [1990] ECR 3125.

25. A particular problem arises in cases where the Commission wishes to rely as against one undertaking on a document containing business secrets of another undertaking, where this latter will not release the Commission from its obligation to preserve the confidentiality of the document. Such conflicts can be solved only on a case-by-case basis. One solution the Commission has already used is to send the firm concerned a non-confidential summary of the document. It is examining other possibilities, such as inspection of the documents in question by an accountant or a 'fiduciary' ('société fiduciaire').

3 – Oral Hearings

26. The Commission's administrative procedure takes place mainly in writing and this must remain so on account of the complicated nature of the cases it examines. The oral hearing is the place to clarify certain matters which have not been settled during the written procedure and to emphasize the main lines of the case.

The Commission recognizes the need to make sure that the hearing is properly prepared and particularly that questions of fact are clarified in so far as possible. It already customarily supplies firms in advance with a list of questions on which it wishes them to outline their points of view.

The is also considering making certain changes to proceedings at the actual hearings. Although the Commission has no reason to believe that they are not conducted fairly at present it intends to emphasize the objectivity of the hearing. With this in mind it envisages appointing hearings officers, duly authorized to chair hearings, vested with genuine autonomy and the right of direct access to the responsible Member of the Commission. This would provide an even better guarantee that the Commission, when stating its views on an individual case as a decision-making authority, would be fully informed of all features of the case decision-making authority, would be fully informed of all features of the case whether favourable or unfavourable to the undertakings.

27. It must, however, be kept in mind that the Commission's procedure relating to restrictive practice and abuse of a dominant position is administrative and not judicial;[6] it must not be turned into a trial.

This is a factor to which the Commission has regard when it has to examine proposals for introducing into its procedure an independent person, who would play a decisive role from the commencement of the proceedings right up to adoption of the final decision.

Mention has been made in some interested quarters of the introduction of administrative law judges who are autonomous and are appointed in particular to the Federal Trade Commission (FTC) and who in the United States hold, like the Commission, powers of investigation and decision in the field of competition. These administrative law judges are themselves empowered to carry out investigations and of forward decisions to the FTC. The introduction of such an authority which, moreover, does not seem to have proved fully satisfactory, at any rate in the competition field, in the United States, does not seem compatible with the institutional scheme of the Treaty. In addition, it could well make procedures in individual cases even more complicated and prolonged.

Parliament[7] has proposed the possible appointment by the Court or by the Commission of persons independent of the Directorate-General for the Competition who would take part in investigations and deal with certain procedural problems. Although to a lesser degree, this solution raises many of the same problems as administrative law judges, while it would still not completely attain the goal of providing substantial additional guarantees of the right of defence.

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[6] See case law of the Court, recently reiterated in the abovementioned *Federal Case*, Tenth Report on Competition Policy, point 49.

[7] Point 41 of the Resolution on the Tenth Report on Competition Policy; point 166 of this Report.

Conclusion

28. The Commission considers that the practical steps outlined above can be expected to make a substantial improvement to its decision-making process and allay to a great extent the concern expressed in interested economic and legal circles. Only the passage of time will tell, however, whether the reforms which have been introduced will provide an adequate, completely satisfactory solution in practice. The Commission intends to put them to the test before reconsidering the whole matter again.

§ 5 – Application of the competition rules to small and medium-sized enterprises

29. Because they are a cornerstone of the industrial and commercial structure of the Community and a major source of innovation and jobs, small and medium-sized enterprises (SME) have a critical role to play, especially in the current recession. As a result, they are the subject of attention from and concern in numerous bodies at national, Community and international level.[8] As a contribution to its continuing dialogue with Parliament on this matter, the Commission sent to it, at the end of 1980, a communication taking stock of what is being done in the Community to help small and medium-sized enterprises and proposing certain measures.[9] Also the Commission emphasized and developed the important role of SME, cooperatives and local initiatives in its Communication to the Council pursuant to the 30 May 1980 Mandate entitled "Job creation: Priorities for Community Action".[10]

30. During talks with the Commission, the representatives of SME, in support of their efforts to obtain easier ac-

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[8] For example, the Council of Europe adopted on 3.7.1980 Recommendation 895 on the future of small and medium-sized businesses in Europe.

[9] COM(80) 726 final. This report was the subject of a resolution by Parliament (adopted on 19.2.1982) based on a report by its Committee on Economic and Monetary Affairs (rapporteur Mr. Deleau).

[10] COM(81) 638 final.

cess to the internal market of the Community, called in particular for the abolition of the administrative, technical and tax obstacles and of the other non-tariff barriers. Improved access to financial instruments such as the Social Fund and the Regional Fund and an adjustment of their social security contributions. Although competition policy cannot achieve such objectives alone, its role as it affects SME is far from negligible. To the extent that it really makes it possible to maintain or re-establish a competitive structure, competition policy helps create a legal and economic environment in which SME can compete, if not on equal terms, at least with the maximum chance of success, with large firms, both private and public, national and multinational, operating in the same market.

31. It is with this in mind that, in implementing the competition rules as they apply both to undertakings[11] and to action taken by Member States,[12] the Commission has not hesitated to resort, with a view to strengthening the competitive capacity of SME, to two types of measures provided for in the Treaty:

(i) The Commission considers, that very many agreements to which such undertakings are parties are not caught by the prohibition on restrictive practices.

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[11] For a detailed description of the general and specific measures taken to assist in SME, see the Seventh Report on Competition Policy, points 21 and 26.

[12] Points 244 and 245 of this Report.

REGULATION NO. 17 First Regulation Implementing Articles 85 and 86 of the Treaty

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Article 10

Liaises with the authorities of the Member States

1. The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85(3).

2. The Commission shall carry out the procedure set out in paragraph 1 in close and constant liaison with the competent authorities of the Member States; such authorities shall have the right to express their views upon that procedure.

3. An Advisory Committee on Restrictive Practices and Monopolies shall be consulted prior to the taking of any decision following upon a procedure under paragraph 1, and of any decision concerning the renewal, amendment or revocation of a decision pursuant to Article 85(3) of the Treaty.

4. The Advisory Committee shall be composed of officials competent in the matter of restrictive practices and monopolies. Each Member State shall appoint an official to represent it who, if prevented from attending, may be replaced by another official.

5. The consultation shall take place at a joint meeting convened by the Commission; such a meeting shall be held not earlier than fourteen days after dispatch of the notice convening it. The notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the con-

sultative proceedings shall be annexed to the draft decision. It shall not be made public.

Article 11

Requests for information

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.

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PATRICK LYNCH (S.B. #39749)
DAVID I. HURWITZ (S.B. #174632)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

Attorneys for
Advanced Micro Devices, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Advanced Micro Devices, Inc. Applicant, v. Intel Corporation, Respondent.	Case No. CIV 01 7033 MISC WAI **AMD'S APPLICATION FOR ORDER DIRECTING INTEL TO PRODUCE DOCUMENTS PURSUANT TO 28 U.S.C. § 1782 FOR USE IN EUROPEAN COMMISSION, CASE NO. COMP/C3-37.990 – AMD/INTEL**

Pursuant to 28 U.S.C. § 1782, Advanced Micro Devices, Inc. ("AMD") respectfully applies for an order to Intel Corporation ("Intel") directing that it produce in electronic format, the Intel documents produced to Intergraph Corporation in the case of Intergraph Corporation v. Intel Corporation, CV 97-N-3023-NE, United States District Court for the Northern District of Alabama, Northeast Division (the "Intergraph case") and the transcripts of depositions of Intel employees taken in the Intergraph case. AMD makes this application as a party interested in a proceeding before the European Commission, Case No. COMP/C3-37.990 - AMD/Intel.

Jurisdiction

1. The Court has jurisdiction pursuant to 28 U.S.C. § 1331. This application is made pursuant to 28 U.S.C. § 1782. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

Intradistrict Assignment

2. This application should be assigned to the San Jose Division pursuant to Civil L.R. 3-2(e).

Parties

3. AMD is a corporation organized under the laws of Delaware with its principal place of business located in Sunnyvale, California.

4. Intel is a corporation organized under the laws of Delaware with its principal place of business located in Santa Clara, California.

European Commission Proceeding

5. On October 23, 2000, AMD filed a complaint with the European Commission against Intel for engaging in anti-competitive behavior in violation of Articles 81 and 82 of the EC Treaty. The case is now pending before the European Commission, Case No. COMP/C3-37.990 - AMD/Intel.

6. AMD's complaint alleges that Intel has abused its dominant position in the Windows-capable microprocessor market through: (i) granting loyalty rebates and imposing exclusive purchasing obligations on manufacturers of personal computers and retailers which have a substantially foreclosing effect on the market; (ii) price discrimination and refusing to supply necessary components new Intel products and product information to manufacturers as retribution for buying from AMD; and (iii) entering into standard-setting cartels with other manufacturers to the competitive injury of firms not allowed timely access to the standard specifications. These practices would constitute an infringement of Article 81 and/or 82 of the EC Treaty and of Articles 53 and/or 54 of the EEA Agreement.

7. AMD is an interested party in the European Commission proceeding as the complaining party.

Intel Document Production and Deposition Testimony in Intergraph v. Intel

8. Intel produced documents and provided testimony in the Intergraph case, a private antitrust action filed by Intergraph against Intel alleging that Intel had monopolized the Windows-capable microprocessor market and associated chipsets.

9. AMD believes that the documents produced and testimony provided by Intel in the Intergraph case would be highly pertinent to the claims raised by AMD in its complaint and would be of great assistance to the European Commission in reaching a decision on AMD's claims.

10. AMD does not have access to the documents produced and transcripts of testimony provided in the Intergraph case as such documents and transcripts are subject to a protective order issued in that action.

11. It would not be overly burdensome or oppressive for Intel to produce the documents and transcripts from the Intergraph case to AMD for use in the proceeding before the European Commission as the documents are readily identifiable and Intel has gathered and reviewed the documents for privilege.

WHEREFORE, AMD prays for an order directing Intel Corporation to produce to AMD the documents Intel produced and transcripts of testimony provided in the Intergraph case, for use in the proceeding now pending before the European Commission, Case No. COMP/C3-37.990 - AMD/Intel, and for such other and further relief as the Court may deem just and proper.

Dated: September 26, 2001

PATRICK LYNCH
DAVID I. HURWITZ
O'MELVENY & MYERS LLP

By /s/ _____
PATRICK LYNCH

Attorneys for Advanced Micro Devices, Inc.

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Dated: September 26, 2001

PATRICK LYNCH
DAVID I. HURWITZ
O'MELVENY & MYERS LLP

By /s/
PATRICK LYNCH

Attorneys for Advanced Micro Devices, Inc.

PATRICK LYNCH (S.B. #39749)
DAVID I. HURWITZ (S.B. #174632)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

Attorneys for
Advanced Micro Devices, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Advanced Micro Devices, Inc. Applicant, v. Intel Corporation, Respondent.	Case No. 01 7033 MISC WAI **DECLARATION OF PATRICK LYNCH IN SUPPORT OF AMD'S APPLICATION FOR ORDER DIRECTING INTEL TO PRODUCE DOCUMENTS PURSUANT TO 28 U.S.C. § 1782** Date: November 12, 2001 Time: 2 p.m. Place: Courtroom of the Honorable William A. Ingram

I, Patrick Lynch, am an attorney licensed to practice in the State of California and before this Court. I am one of the attorneys counseling Advanced Micro Devices, Inc. in the proceedings now pending before the Commission, Case COMP/C3-37.990 - AMD/Intel. I have personal knowledge of the facts stated in this declaration.

1. On October 23, 2000, AMD filed a complaint with the European Commission against Intel for engaging in anti-competitive behavior in violation of the European competition laws. (Case No. COMP/C3-37.990 – AMD/Intel.)

2. AMD's complaint alleges that Intel has abused its dominant position in the Windows-capable microprocessor market through: (i) granting loyalty rebates and imposing exclusive purchasing obligations on manufacturers of personal computers and retailers which have a substantially foreclosing effect on the market: (ii) price discrimination and refusing to supply necessary components new Intel products and product information to manufacturers as retribution for buying from AMD: and (iii) entering into standard-setting cartels with other manufacturers to the competitive injury firms not allowed timely access to the standard specifications.

3. The Commission has submitted written questions to Intel about the allegations of AMD's complaint. AMD has been given access to a redacted version of Intel's response, and it appears to AMD that Intel has evaded the obvious substance of the Commission's inquiry (and AMD's complaint). AMD has so advised the Commission.

4. In connection with its commentary on Intel's response, AMD engaged Professor Jeffrey MacKie-Mason to make an economic evaluation of Intel's position. Prof. MacKie-Mason previously served as an economic consultant to Intergraph Corporation in an action in the Northern District of Alabama charging, among other things, that Intel monopolized and attempted to monopolize the market for x86 microprocessors. As a result of this collaboration, AMD became aware that documents that Intel had produced in the Intergraph litigation would impeach positions Intel has taken with the European Commission and support AMD's allegations relating to relevant market, dominance and abuse of the dominant position. Professor MacKie-Mason actually has possession of many such documents, but is precluded by protective order from providing them to AMD or to the Commission.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 3rd day of October, 2001 at Los Angeles, California.

By /s/ _____
PATRICK LYNCH

PATRICK LYNCH (S.B. 39749)
DAVID I. HURWITZ (S.B. 174632)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

Attorneys for
Advanced Micro Devices, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Advanced Micro Devices, Inc., Applicant, v. Intel Corporation, Respondent.	Case No. 01-7033 MISC WAI **DECLARATION OF INGO BRINKER IN SUPPORT OF AMD'S APPLICATION FOR ORDER DIRECTING INTEL TO PRODUCE DOCUMENTS PURSUANT TO 28 U.S.C. § 1782** Date: November 12, 2001 Time: 2 p.m. Place: Courtroom of the Honorable William A. Ingram

I, Ingo Brinker, am an attorney licensed to practice before the European Commission and am counsel to Advanced Micro Devices, Inc. in the proceedings now pending before the Commission, Case COMP/C3-37.990-AMD/Intel. I have personal knowledge of the facts stated in this declaration.

1. The Treaty establishing the European Community, as amended by the Treaty of Amsterdam, sets forth rules

regarding anti-competitive behaviour, either on the basis of bi- or multilateral agreements and/or concerted practices between business enterprises or decisions by associations of business enterprises (Art. 81 EC) or on the basis of an abuse of a dominant position within the Common Market (Art. 82 EC). Pursuant to Art. 85 EC, the Commission shall ensure the application of the principles laid down in Art. 81 and 82 EC.

2. On application by a Member State or on its own initiative the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. Pursuant to Art. 85 (2) EC, the Commission shall record such infringements of the principles in a recent decision if the infringement is not brought to an end. On the basis of an implementing regulation, adopted by the Council on the basis of Art. 83 EC, the Commission is empowered to investigate suspected infringements.

3. The Council has adopted Regulation 17/62. Pursuant to Art. 3 of this Regulation, the Commission may by decision require the business enterprises or associations of business enterprises concerned to bring such infringement to an end where the Commission finds that there is an infringement of either Art. 81 or Art. 82 EC. Pursuant to Art. 15 Regulation 17/62, the Commission may by decision impose on business enterprises fines of a sum not exceeding 10% of the turnover in the preceding business year of each of the business enterprises participating in the infringement where, either intentionally or negligently, the companies infringe Art. 81 (1) or Art. 82 EC.

4. Pursuant to Art. 3 Regulation 17/62, the Commission may investigate suspected infringements either on its own initiative or upon application either of a Member State or of a natural or legal person who claims a legitimate interest. Thus, any company who may claim a legitimate interest in the alleged infringement of another company may file a complaint with the European Commission.

5. Pursuant to the established standards recognised and acknowledged by the European Court of Justice the Commission is obliged to start a pre-investigation in order to determine the merits of such a complaint. If the Commission concludes during the pre-investigation phase that there is no infringement of either Art. 81 or 82 EC or if the Commission does not regard the violation as significant enough to be handled by the Commission, the Commission might reject the application. Under those circumstances, the Commission is required to issue a so-called Art. 6 letter to the complainant. Pursuant to Art. 6 of Commission Regulation 2842/98, the Commission has to inform the complainant about the reasons and its arguments that the complaint should be rejected. Following this letter, the complaining party is entitled to request access to the Commission's file. In addition, the complainant might ask for a public hearing. After these procedural steps, the European Commission might reject the complaint. In such a case, the complainant might file an action for annulment pursuant to Art. 230 EC with the European Court of Justice in Luxembourg.

6. If the Commission, on the contrary, intends to proceed, it prepares a so-called statement of objections. Pursuant to Art. 7 of Commission Regulation 2842/98, the Commission must include all allegations regarding the infringement of Art. 81 and/or 82 EC. The accused party has a right to comment upon the statement. In addition, the accused party might request access to the Commission's file. The accused party is also entitled to request the establishment of a public hearing. Pursuant to these procedural steps, the Commission might issue a decision against the accused party. The accused party might also file an action for annulment pursuant to Art. 230 EC to the European Court of Justice in Luxembourg.

7. The complaining party has a formal right to participate in both the pre-investigation phase as well as in the investigation procedure, i.e. after the issuance of the statement of objections. All parties participating in the procedure might submit legal briefs, documents, information, etc. In addition, all parties might present expert witness as well

as "ordinary" witnesses. As long as the Commission has not issued its statement of objections, neither party is prevented from submitting additional material. Only after the Commission has addressed the statement of objections to the accused party is the scope of the procedure confined to the allegations that have been addressed in the statement. Afterwards, the Commission might only broaden the scope if it redoes the entire procedure from the very beginning.

8. The Commission has various means for using its investigative power. The Commission might issue request for information pursuant to Art. 11 of Regulation 17/62. Pursuant to Art. 11 (4) Regulation 17/62, the owners of business enterprises or the persons authorized to represent companies or firms by law shall supply the information requested by the Commission. Where a business enterprise does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission, on the basis of Art. 11 (5) Regulation 17/62 shall by decision require the information to be supplied. Such decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties as well as the right to have the decision reviewed by the European Court of Justice. Pursuant to a most recent decision issued by the European Court of First Instance, in principle the accused party does not have a right to withhold information. Thus, the accused party is legally obliged to co-operate fully.

9. In addition, the Commission may undertake all necessary investigations to business enterprises and associations of business enterprises. To this end, the officials authorized by the Commission are empowered to examine the books and other business records, to take copies of or extracts from the books and business records, to ask for oral explanations on the spot, to enter any premises, land and means of transport of business enterprises. The officials of the Commission authorized for the purpose of the investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties where production

of the required books or other business records is incomplete.

10. After finalizing the pre-investigation phase, the European Commission either closes the file, after having informed the complaining party pursuant to Art. 6 of Commission Regulation 2842/98, or issues a statement of objections, on the basis of Art. 7 of Commission Regulation 2842/98. After following the procedural steps described above, the Commission is authorized to issue a self-executing decision, which is based on the statement of objections and takes the written comments as well as the comments of the accused party presented in the public hearing into account. This decision is self-executing directly binding and enforceable. Thus, the Commission need not e.g. file an application with a competent court. On the contrary, the Commission is authorized to issue binding and directly enforceable legal orders.

11. Under Art. 230 EC, the accused party might file an action for annulment. The European Court of First Instance is in charge of reviewing the Commission's decision fully and to the broadest extent. The Court of First Instance is in particular authorized to review the Commission's decision on the imposition of fines. The Court can use its own discretion and might set a different fine, thereby imposing higher or lower fines on the accused party.

12. If the Court of First Instance has either confirmed or annulled the decision, either partially or entirely, either the accused party or the Commission might file an appeal with the European Court of Justice. The Court of Justice is in charge of the legal review only and reviews the Court of First Instance's decision only with regard to the observation of the procedural or substantive law. However, it does not review the factual basis of the Court of First Instance's decision.

13. The complaining party is also entitled to participate in the Court procedure. As mentioned above, the complaining party is also authorized to file an action for annulment pursuant to Art. 230 EC if the Commission decides to close

the file and to reject the complaint. If, however, the Commission renders a decision against the accused party, following the issuance of a statement of objections, the complaining party might apply for becoming involved in the court procedure if the accused party files an action for annulment against the European Commission's decision.

14. AMD as the complaining party is expected to provide the Commission with all supporting evidence that it can reasonably provide. It is important that AMD discharge this duty because of the Commission's limited resources to investigate anti-competitive behavior.

15. The Commission welcomes evidence submitted by parties where such evidence is obtained through judicial proceedings in the United States.

16. Business secrets and confidential information submitted to the Commission are protected against disclosure by the Commission's rules and regulations regarding professional secrecy.

17. Pursuant to the Agreement between the Commission of the European Communities and the Government of the United States of America regarding the application of their competition laws, the Commission and the United States Government exchange information regarding anti-competitive activities.

18. I am a graduate of the University of Chicago Law School. Based on my training in the laws of the United States, it is my opinion that the Commission performs quasi-judicial functions analogous to those of the Federal Trade Commission.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 26th day of September, 2001 at Munich, Germany.

/s/_____
Dr. Ingo Brinker

PATRICK LYNCH (S.B. #39749)
DAVID I. HURWITZ (S.B. #174632)
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, California 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

Attorneys for
Advanced Micro Devices, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Advanced Micro Devices, Inc., Applicant, v. Intel Corporation, Respondent.	Case No. 01-7033 MISC WAI **DECLARATION OF JEFFREY MACKIE-MASON IN SUPPORT OF AMD'S APPLICATION FOR ORDER DIRECTING INTEL TO PRODUCE DOCUMENTS PURSUANT TO 28 U.S.C. § 1782** Date: November 12, 2001 Time: 2 p.m. Place: Courtroom of the Honorable William A. Ingram

I, JEFFREY MACKIE-MASON, declare as follows:

1. I am the Arthur W. Burks Collegiate Professor of Information and Computer Science at the University of Michigan, and am also a Professor of Economics and Public Policy at the University. I have given expert opinions in a number of other antitrust cases, identified in the curriculum vitae attached hereto as Exhibit "A." That document also sets

forth all publications I have authored or co-authored within the last 10 years.

2. In 1998 I was retained by attorneys for Intergraph Corp. to offer certain economic testimony in *Intergraph v. Intel* (U.S. District Court, Northern District Alabama, Northeast Division, Civil Action No. 97-N-3023-NE) (the "*Intergraph* case"), a private antitrust action filed by Intergraph against Intel Corporation alleging, *inter alia*, that Intel had monopolized the markets for x86 microprocessors and associated chipsets. Among the actions taken by Intel that were alleged by Intergraph to have preserved or enhanced Intel's monopoly power was the failure to disclose critical interface information needed by Intergraph and other of Intel's microprocessor competitors to enable them to design products that would interoperate with products developed by Intel or with products developed by third parties with Intel's assistance.

3. In connection with my assignment for Intergraph, my staff and I reviewed over 16 thousand of pages of confidential material produced by Intel, as well as 45 volumes of confidential *Intergraph* depositions and another 17 volumes of confidential depositions from various FTC actions involving Intel that were produced in the *Intergraph* case. These documents and depositions related, broadly speaking, to the issues of: (a) the market within which Intel x86 microprocessors compete; (b) the power that Intel enjoys within that market; (c) actions taken by Intel to preserve and enhance its position in the market; and (d) the impact of the actions taken by Intel to preserve and enhance its market position. I am prohibited by the court order attached hereto as Exhibit "B" from disclosing the content of the Intel confidential materials my staff and I reviewed in connection with our work in the *Intergraph* case.

4. Subsequent to the conclusion of the *Intergraph* case, I was retained by Advanced Micro Devices ("AMD") to provide economic analysis on issues raised in a complaint that AMD had filed with the European Commission (the "Commission"). The complaint alleges, among other things, that Intel has monopolized the worldwide market for Windows-

capable i.e. x86, microprocessors by developing product interfaces in secret with selected undertakings, then delaying public disclosure of those interfaces in order to gain an artificial advantage in the marketplace. It also alleges that Intel has monopolized the market through coercive and exclusionary acts towards rivals and towards its customers that do business with its rivals. These allegations are highly similar to those made in the *Intergraph* case.

5. Many of the documents produced by Intel in the *Intergraph* case are very pertinent to the issues raised by AMD in its complaint to the European Commission and would be of great assistance to the Commission in reaching a decision on AMD's claims. Indeed, in the analysis I have been undertaking at the request of AMD, there are many issues on which I would have referred to and relied upon Intel documents I have previously reviewed were I permitted to do so. While I am bound not to disclose the content of the documents in question, I can say without disclosing their actual content that they relate directly to the most crucial issues raised by AMD, including the nature of the relevant product market; Intel's power within that market; Intel's interface development and disclosure practices; and the impact of those practices upon Intel's competitors, including AMD. I actually have possession of a number of such documents, but am precluded by protective order from providing them to AMD or to the Commission.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 27th day of September, 2001, at Ann Arbor, Michigan.

/s/_____
Jeffrey MacKie-Mason

ROBERT E. COOPER (SBN 035888)
JOSEPH KATTAN (admitted pro hac vice)
SAMUEL G. LIVERSIDGE (SBN 180578)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

JAMES A. MURRAY (SBN 062227)
Intel Corporation
2200 Mission College Blvd.
SC4-202
Santa Clara, CA 95052-8119
Telephone: (408) 653-5370
Facsimile: (408) 765-4178

Attorneys for Respondent
INTEL CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ADVANCED MICRO DEVICES, INC. Applicant, v. INTEL CORPORATION, Respondent.	Case No. 01-7033 MISC WAI **DECLARATION OF JAMES F. RILL IN SUPPORT OF INTEL CORPORATION'S OPPOSITION TO ADVANCED MICRO DEVICES' APPLICATION FOR ORDER** Date: November 19, 2001 Time: 2:00 P.M. Courtroom: Courtroom of the Honorable William A. Ingram

1. I am a senior partner of the law firm of Howrey Simon Arnold & White, LLP, headquartered in Washington, D.C. I served as Assistant Attorney General for the Antitrust Division of the United States Department of Justice during the first Bush Administration, from 1989-1992. In that capacity, I was the senior Justice Department official responsible for enforcing civil and criminal federal antitrust laws, developing and implementing the Justice Department's policies with respect to those laws and managing the Justice Department's Antitrust Division.

2. Much of my public and private service has been devoted to the development and implementation of policies relating to the interaction of the United States and foreign governments in enforcing the antitrust and competition laws across jurisdictions and worldwide. In addition to my responsibilities as Assistant Attorney General (which are the most pertinent to this proceeding and discussed below), I served as Co-Chair of the U.S. Department of Justice International Competition Advisory Committee, from 1997 to February 2000, having been appointed by Attorney General Janet Reno and Assistant Attorney General Joel Klein with a mandate to recommend policy initiatives to the Justice Department. I am currently Vice-Chairman of the International Business and Industry Advisory Committee ("BIAC") of the Competition Law and Policy Committee of the Organization of Economic Cooperation and Development (OECD), providing advice to antitrust enforcement officials of OECD member states. I was a member of the Advisory Board of the United States Office of Technology Assessment of Multinational Firms and the U.S. Technology Base. I currently serve as Vice Chairman of the U.S. Council for International Business, the U.S. representative body of the BIAC and the International Chamber of Commerce. I served as Chair of the Section of Antitrust Law of the American Bar Association, and am currently a member of the American Bar Association Tri-National NAFTA Task Force.

3. In my capacity as Assistant Attorney General for Antitrust, I was principally responsible for the development and implementation of the Justice Department's antitrust

policy and enforcement. During my tenure, the Department issued the 1992 *Horizontal Merger Guidelines*, the first set of antitrust enforcement guidelines issued jointly by the Department of Justice and the Federal Trade Commission. During this same period, the Department issued Revised Guidelines for International Antitrust reasserting U.S. commitment to enforcement against antitrust violations affecting U.S. foreign commerce; and the Department reinvigorated its merger enforcement activity, initiating the largest number of formal and announced merger challenges in over a decade.

4. Of particular relevance to this proceeding, I was responsible for negotiating with Sir Leon Brittan, Vice-President of the Commission of the European Communities, the Antitrust Cooperation Agreement of September 23, 1991, between the United States and the European Union. That agreement (attached hereto) sets forth the mechanisms and procedures by which the United States and the European Commission cooperate and share evidence relating to enforcement of the antitrust and competition laws of our respective jurisdictions.

The U.S. - E.U. Cooperation Agreement Governs the Manner by which the United States May Assist the European Commission in Collecting Evidence and Does Not Provide for Use of U.S. Courts by Private Third-Parties

5. The U.S. - E.U. Cooperation Agreement governs the procedure by which the instrumentalities of the United States government may assist the European Commission in obtaining documents and other information located in the United States (and vice-versa). In particular, Article V of the Agreement provides that, in the event of a possible antitrust violation affecting the European Union, the European Commission may request the United States government to initiate an enforcement investigation, including use of its compulsory process powers to obtain potentially relevant information from a private party located in the United States:

> If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities.

Article V.2.

6. Should the United States choose to open such an investigation and obtain documents from a private party, the Cooperation Agreement provides that those materials may be made available to the European Commission upon its request:

> Upon receiving a request from the other Party, and within the limits of Articles VII and IX, a Party will provide to the requesting Party such information within its possession as the requesting Party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities.

Article III.4. In the event that the information requested contains confidential information obtained from a company, the information may be released upon a written waiver from the company from which it was obtained. Article VIII. *See* 15 U.S.C. § 57b-2(b)(3)(C).

7. I have reviewed the papers submitted in this proceeding by Advanced Micro Devices, Inc. ("AMD") in support of its application for the production from Intel Corporation of documents that AMD intends to submit to the European Commission in an effort to support its antitrust allegations against Intel. Neither the officials of the European Union nor the United States envisioned that a private party could or should take it upon itself to initiate a court proceeding in the United States to obtain documents for the ostensible purpose of providing them, unsolicited, to the European Commission. I am unaware of any circumstance in which such a private party has attempted or succeeded in doing so.

8. There are sound reasons for structuring the Cooperation Agreement in a manner that does not contemplate a

private party's use of the U.S. courts to obtain evidence on behalf of the European Commission. The Agreement reflects the role of the European Commission in enforcing European Community competition laws and the relationship of private parties to the Commission. It is the European Commission, not private parties, that has responsibility for initiating an investigation, obtaining evidence and taking any enforcement measures. Unlike a private lawsuit initiated in the U.S. or Europe, the role of complaining private parties before the Commission is to cause the *Commission* to make preliminary inquiries, to persuade the Commission to initiate a formal investigation, and to provide information that the Commission may request from it in performing the Commission's functions. The Cooperation Agreement reflects this important distinction between a private lawsuit and the Commission's procedures, allowing the Commission to decide when and how to obtain information located in the United States and underscoring that private parties are not entitled to compulsory process to "assist" the Commission in its work. Nowhere does the Agreement allow private parties to take it upon themselves to use the U.S. courts or other instrumentalities of government to obtain hoped-for "evidence" that the Commission itself did not request. If the Commission, in fulfilling its responsibilities, desires those materials, there are agreed-upon established mechanisms contained in the Cooperation Agreement by which they may be obtained.

European Commission Enforcement Activities Do Not Resemble the Adjudicatory Proceedings of the Federal Trade Commission

9. Apart from the restrictions and procedures contained in the Cooperation Agreement, I understand AMD to argue that European Commission investigations and enforcement activities are adjudicative proceedings for purposes of 28 U.S.C. § 1782. In this regard, I understand that AMD seeks to analogize the European Commission's investigations with the adjudicative proceedings undertaken by the Federal Trade Commission ("FTC"). I am intimately familiar with FTC adjudicatory procedures, having practiced before the

agency for over 30 years. I worked closely with the FTC, and jointly developed policy initiatives with the FTC, during my tenure as Assistant Attorney General of the Justice Department. As Chair of the Section of Antitrust Law of the American Bar Association, I established a Special Committee to study the FTC, a committee that has been endorsed by successive FTC Chairmen.

10. I am familiar with the declaration of Nigel Parr detailing the procedures of the European Commission, and I am independently familiar with those procedures. Based on my review of that declaration, it is clear to me that the European Commission's investigative and enforcement procedures are not at all comparable to the adjudicatory functions of the Federal Trade Commission and lack the qualities that make a proceeding "adjudicative."

11. The FTC's adjudicative regulations require formal adversarial proceedings when a private party may be subject to a civil penalty under a statute administered by the agency. 15 U.S.C. § 45(b); 16 C.F.R. § 3.2. Unlike European Commission investigations described in Dr. Parr's declaration, the rules governing FTC adjudicatory proceedings separate the functions that are adversarial (and therefore not impartial) from those that are adjudicative (and therefore must remain impartial). These procedures are mandated by section 554 of the Administrative Procedure Act, 5 U.S.C. § 554, which applies to proceedings "required by statute to be determined on the record after opportunity for an agency hearing." *See Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232, 241 (1980). *See also* 16 C.F.R. § 3.2 ("Adjudicative proceedings are ... required by statute to be determined on the record after opportunity for an agency hearing.")

12. A review of FTC adjudicatory procedures illustrates the differences from European enforcement actions. FTC adjudicatory proceedings commence when the Commission votes to issue a complaint. 16 C.F.R. § 3.11. At that point, an Administrative Law Judge ("ALJ") is appointed, under statutory provisions designed to assure the ALJ's independence, to preside over a proceeding that closely re-

sembles a judicial proceeding and prohibits ex parte communications. The ALJ is prohibited from communicating with any other arm of the FTC regarding a matter both before the issuance of the complaint, such as when the matter is under investigation, and after the issuance of the complaint. Upon the issuance of a complaint, the Commission itself becomes subject to rules that bar it from ex parte communications regarding the matter in adjudication with any other person, including the investigative/prosecuting bureau, the respondent or the ALJ.

13. The respondent is obligated to answer the FTC's complaint, is entitled to file motions and is entitled to take discovery. Parties in an FTC proceeding are entitled to obtain discovery from any other party, as well as from third parties, using all of the familiar methods provided in the Federal Rules of Civil Procedure, so long as the information sought is "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). Unlike European Commission investigations, FTC adjudicatory proceedings permit any party to request admissions (*Id.* at § 3.32), obtain and use deposition testimony (*Id.* at § 3.33), propound interrogatories (*Id.* at § 3.35), obtain production of documents and things (*Id.* at § 3.37), and subpoena third-parties for documents and testimony (*Id.* at § 3.34). The FTC adjudicatory rules also permit the parties to object to the provision of such discovery and to file motions to compel. *Id.* at §§ 3.37(b), 3.38. As shown in Dr. Parr's declaration, none of these adjudicatory procedures is available to respondents or other private parties before the European Commission.

14. The different procedures for conducting the hearings themselves further underscore that the European Commission does not undertake an adjudicative process. Unlike European Commission hearings, respondents before the FTC "have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing." 16 C.F.R. § 3.41(c). Evidence in an FTC hearing, unlike a European Commission

hearing, is not admissible unless the proponent shows that the evidence is "relevant, material, and reliable." *Id.* at § 3.43(b). The parties in an FTC hearing may object to the admissibility of evidence on these grounds. *Id.* at § 3.43(e). All testimony in FTC adjudicative proceedings must be under oath. *Id.* at 3.42(c)(1) (hearings); *Id.* at § 3.33(a) (depositions). The adjudicative procedures also provide for the issuance of subpoenas to compel the testimony of witnesses with material knowledge of matters in dispute. *Id.* at § 3.34.

15. In contrast to a European Commission investigation, the FTC Administrative Law Judge files an initial decision, based on proposed findings of fact and conclusions of law, upon closing of the hearing record. A party may appeal that decision, on specified grounds, to the five-member Commission, in a proceeding resembling an appellate court proceeding. 16 C.F.R. § 3.52. The Commission is a neutral adjudicator of a dispute between the investigative/prosecuting bureau and the respondent, and is subject to ex parte prohibitions as discussed in paragraph 12 above. In the absence of an appeal, the Commission reviews the decision and determines for itself the issues it will consider, requesting any briefing from the parties that the Commission deems appropriate. *Id.* at § 3.53. In rendering its decision, the Commission may adopt, modify or set aside the findings, conclusions, and rule or order contained in the initial decision, and includes in the decision a statement of the reasons or basis for its action and any concurring and dissenting opinions. *Id.* at § 3.54.

16. In short, the FTC, with the assistance of its Administrative Law Judges, "adjudicates" disputes in proceedings reflecting an adversarial process, due process, discovery opportunities and an initial decision-maker unconnected with the agency's prosecutorial functions. It is for these reasons that the courts, including the Supreme Court decision cited by AMD in this proceeding, characterize the FTC as having "quasi-judicial powers" in addition to its separate "quasi-legislative" powers. *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). *See Federal Trade Commission v. Atlantic Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977).

The FTC and European Commission Both Strictly Protect The Confidentiality of Documents Submitted During An Investigation

17. Although dissimilar in many ways, the FTC and the European Commission are similar in their firm prohibition against disclosure of a party's confidential documents or other information obtained by compulsory process during the course of their investigations. The FTC Act provides that "no documentary material, reports or answers to questions, and transcripts of oral testimony shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material or transcripts." 15 U.S.C. § 57b-2(b)(3)(C). I understand that similar rules apply to the European Commission.

18. These rules are designed to protect a party, even one under investigation, from opportunistic conduct by third-parties such as, in this case, a competitor of the party under investigation. They also serve to assist the enforcement bodies in obtaining documents and conducting their investigations. Use of 28 U.S.C. § 1782 to circumvent these confidentiality restrictions can only undermine this sound policy.

In accordance with 28 U.S.C. § 1746, I hereby declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 25th day of October 2001, in New York, N.Y.

/s/
James F. Rill

ROBERT E. COOPER, SBN 035888
JOSEPH KATTAN admitted *pro hac vice*
SAMUEL G. LIVERSIDGE, SBN 180578
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

JAMES A. MURRAY (SBN 062227)
Intel Corporation
2200 Mission College Blvd., SC4-202
Santa Clara, CA 95052-8119
Telephone: (408) 653-5370
Facsimile: (408) 765-4178

Attorneys for Respondent
INTEL CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ADVANCED MICRO DEVICES, INC. Applicant, v. INTEL CORPORATION, Respondent.	Case No. CIV 01 7033 MISC WAI **DECLARATION OF DARREN B. BERNHARD IN SUPPORT OF INTEL CORPORATION'S OPPOSITION TO ADVANCED MICRO DEVICES' APPLICATION FOR ORDER** Date: November 19, 2001 Time: 2:00 p.m. Courtroom: Courtroom of the Honorable William A. Ingram

1. I am a partner in the law firm of Howrey Simon Arnold & White, LLP. and I have practiced at the firm since 1986. I was counsel of record for Intel in the FTC antitrust case against Intel (FTC Docket No. 9288), and I am counsel of record for Intel in the Intergraph matter now pending in the Northern District of Alabama (*Integraph Corp. v. Intel Corp.* CV 97-N-3023-NE, N.D. Ala). I am currently counsel for Intel in connection with the European Commission's pre-investigational inquiry regarding the complaint lodged by Advanced Micro Devices ("AMD") with the Commission against Intel. I base this Declaration upon personal knowledge and my review of pertinent records.

A. Summary Of Intergraph's Allegations

2. Intergraph was an OEM that made computer workstations specializing in high performance computer graphics.[1] Beginning in 1993, Intergraph used Intel microprocessors in its workstations. Starting in late 1996, Intergraph threatened more than 30 of Intel's customers with infringement of Intergraph's patents based on the customer's use of Intel microprocessors. The accused companies promptly sought indemnification from Intel. *See Intergraph Corp. v. Intel Corp,* 195 F.3d 1346, 1349-1350 (Fed. Cir. 1988).[2] Intel

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[1] A workstation is a high-end computer used in various applications that require greater computing performance than the typical desktop system used by businesses or individuals. For example, workstations are used by graphics companies to create 3D video used in movies, computer games, and TV animation. Workstations are also used by engineers involved in creating three-dimensional designs and blueprints.

[2] There are four reported decisions relating to Intergraph's antitrust allegations and containing relevant discussion of the issues involved in that litigation. They are *Intergraph Corp. v. Intel Corp.* 3F. Supp. 2d 1255 (N.D. Ala. 1998), *vacated,* 195 F.3d 1346 (Fed. Cir. 1998) (district court grants Intergraph's motion for a preliminary injunction); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999) (Federal Circuit reverses district court. vacating preliminary injunction, and holding that Intergraph has no cognizable antitrust claims); *Intergraph Corp. v. Intel Corp.*, 88 F. Supp. 2d 1988 (N.D. Ala. 2000), *aff'd*, 253 F.3d 695 (Fed. Cir. 2001) (district court grants Intel's motion for summary judgment on all of Intergraph's antitrust claims); and *Intergraph Corp. v. Intel Corp.* 253

began negotiations with Intergraph about a license to the patents, but the negotiations failed and the parties' relationship deteriorated. As a result, Intel ceased treating Intergraph as a preferred customer. Intel continued supplying Intergraph with microprocessors and other products that were generally available in the marketplace, but Intel stopped providing Intergraph with non-public technical information, pre-release samples of patented microprocessors and individualized technical assistance. 195 F.3d at 1349 - 51.

3. On November 17, 1997, Intergraph sued Intel for patent infringement (after amendments Intergraph would assert five patents against Intel), seeking substantial monetary damages from Intel, as well as a permanent injunction against the sale of Intel's flagship Pentium microprocessors. Intergraph accused virtually every Intel desktop microprocessor of infringing Intergraph patents. Sales of such microprocessors constitute the majority of Intel's revenues.

4. Intergraph also sued Intel for various alleged violations of state law discussed below, and shortly thereafter amended the complaint to assert antitrust claims. In pertinent part, Intergraph's antitrust complaint alleged that Intel's decision not to supply Intergraph with patented Intel sample and pre-release microprocessors constituted monopolization of the microprocessor market in violation of Section 2 of the Sherman Act. Intergraph also alleged that Intel violated Section 2 by using its monopoly in microprocessors to leverage a competitive advantage into downstream markets of workstations, graphics accelerators and chipsets. *Id.* In addition, Intergraph brought a claim under Section 1 of the Sherman Act alleging that Intel conspired with Intergraph's workstation competitors to hinder Intergraph's sale of workstations to a few specific accounts engaged in the digital animation business.

5. Intergraph also asserted 18 separate counts of purported state law violations, all of which arose from the deal-

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F.3d 695 (Fed. Cir. 2001) (Federal Circuit affirms summary judgment for Intel on all of Intergraph's antitrust claims).

ings between Intel and Intergraph. For example, Intergraph brought state law claims for breach of contract and promissory estoppel alleging that a letter Intel sent to Intergraph in 1997 in which Intel stated that it would support Intergraph's product supply, design and manufacturing constituted a contract that was breached when Intel ceased treating Intergraph as a preferred customer after Intergraph threatened Intel and its customers with patent litigation. Intergraph also asserted claims for tortious interference with contract, alleging that Intel told a few digital media companies (companies that create animation and special effects) not to do business with Intergraph after Intergraph threatened Intel and its customers with patent infringement. Integraph brought two breach of warranty claims against Intel alleging that Intel sold Integraph defective chips. Intergraph also brought fraud claims against Intel alleging that Intel misrepresented that Integraph would continually be supplied by Intel and that Intel suppressed the fact that if Intergraph sued Intel or its customers, Intel would cease doing business with Intergraph. (See Exhibit 1 hereto attaching Intergraph Complaints.)[3]

6. Intergraph made no allegations in its complaints with respect to conduct in Europe. More specifically, Intergraph made no claim that Intel interfered with its business relations with any European-based company or that Intel violated the antitrust laws through its sales and marketing activities regarding European customers. In addition, Intergraph made no allegations that Intel conspired with industry members in connection with standard setting activities.[4]

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[3] Intergraph amended its complaint four times during the course of the litigation. Intergraph's final complaint narrowed the number of counts, but most of the underlying state law claims remained. Intel has attached exemplars of the various complaints. If the Court requests all generations of Intergraph's complaints Intel will produce the other generations promptly.

[4] At one point during the parties' patent license discussions, Intergraph asserted that a license offered to it by Intel during the developmental stage of the Accelerated Graphics Port Specification was too broad from

7. On June 17, 1998, Intel answered the complaint, denied the material allegations and brought counterclaims against Intergraph alleging that Intergraph infringed certain Intel patents (eventually Intel asserted seven patents against Intergraph). Intel also brought claims against Intergraph for breach of contract alleging that Intergraph wrongfully withheld Intel confidential information.

B. The Federal Circuit Affirms Summary Judgment Dismissing All Of Intergraph's Antitrust Claims

8. Early on in the litigation, Intergraph moved for a preliminary injunction, arguing that it was likely to succeed on its antitrust claims. In early 1998, the district court granted Intergraph's motion for a Preliminary Injunction. Relying on antitrust theories later rejected by the Federal Circuit, the district court held that Intel was required to treat Intergraph as a "strategic customer in current and future programs" notwithstanding the parties' patent dispute. *See Intergraph Corp. v. Intel Corp.*, 3 F. Supp.2d 1255 (N.D. Ala. 1998), *vacated*, 195 F.3d 1346 (Fed. Cir. 1999).

9. On November 5, 1999, the Federal Circuit reversed and vacated the district court's injunction, concluding that Intergraph did not have a likelihood of succeeding on its antitrust claims. 195 F.3d at 1352. The Federal Circuit held that the parties did not compete in any of the markets claimed to be monopolized by Intel's alleged actions against Intergraph, including the microprocessor market. This lack of a competitive relationship precluded a finding of unlawful abusive conduct towards Intergraph and barred Inter-

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the standpoint of Intergraph as a licensor because it might capture too many Intergraph patents. Although this contention involved an industry specification, Intergraph never accused Intel of "enter[ing] into standard-setting cartels," either during the parties license discussions or in the litigation (*Contrast* AMD App. 3:8-3:9 accusing Intel of entering into such cartels.) Only one Intergraph document request in the litigation specifically referred to AGP or the AGP Specification (*see, e.g.*, Request No. 2 attached to Intergraph's First Request for Admissions) and Intergraph propounded no document requests relating to so-called "standard-setting cartels" or a similar concept.

graph's antitrust complaint. *Id.* at 1359. As an independent ground for reversal, the Federal Circuit held that Intel had no obligation to supply its intellectual property, whether in the form of patents, copyrights or trade secrets. As the Court held: "the antitrust laws do not negate the patentee's right to exclude others from patent property" and "the owner of proprietary information has no obligation to provide it, whether to a competitor, customer or supplier." *Id.* at 1362, 1363. Finally, and wholly apart from the issue of intellectual property, the Federal Circuit held that Intel's cessation of its relations with an adversarial customer that threatened Intel and its customers with litigation did not constitute an antitrust violation. *Id.* at 1358.

10. As detailed more fully below, during the course of the litigation (and particularly following the initial grant of the preliminary injunction) the parties engaged in substantial discovery on the patent claims and counterclaims, as well as the parties' state law claims and Intergraph's antitrust claims. Numerous depositions were taken. Intel made available to Intergraph for inspection approximately 1,435 boxes of documents (totaling approximately 2.75 million pages). After discovery was completed, Intel moved for summary judgment on Intergraph's Section 2 antitrust claims. The main evidence presented by Intergraph in opposition to Intel's motion was the expert report of Professor MacKie-Mason in which he claimed that Intel's withholding of patented technology from Intergraph harmed competition in the relevant antitrust markets.[5]

11. On March 10, 2000, the district court granted Intel's motion for summary judgment. *See Intergraph Corp. v. Intel Corp.*, 88 F. Supp2d 1288 (N.D. Ala. 2000). The District Court ruled that based on the law of the case doctrine, it was bound by the Federal Circuit's decision on the preliminary junction appeal that Intergraph had no cognizable antitrust

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[5] Prior to the close of discovery, Intel moved for summary judgment on Intergraph's Section 1 antitrust claims. Intergraph dismissed those claims with prejudice, without responding to Intel's motion.

claims.[6] On appeal to the Federal Circuit, Intergraph again submitted the entire expert report of Professor MacKie-Mason and argued that "after two years of discovery and rigorous expert economic analysis of the evidence," Intergraph had evidence of harm to competition in microprocessors. Specifically, Intergraph argued that its "expert economist, Professor Jeffrey MacKie-Mason, prepared a comprehensive and thorough expert report explaining how Intel's conduct harmed competition in the microprocessor market."[7] On June 8, 2001, the Federal Circuit rejected Intergraph's arguments and affirmed the District Court's decision granting summary judgment against Intergraph on its antitrust claims, and entered final judgment under Rule 54(b) against Intergraph on those claims. 253 F.3d 695 (Fed. Cir. 2001). At present, only the patent claims and state law claims remain in the case.

C. Intel's Discovery Provided to Intergraph

12. On July 16, 1998, the district court entered a protective order governing the confidentiality of all discovery produced in the case. (See Exhibit 3.) The protective order was entered in the context of a case that principally involved a patent and commercial dispute between companies that were not competitors. The protective order limited access to outside counsel, experts and consultants, and certain in-house counsel at both companies, on a reciprocal basis, that could certify that over the past two years he or she was not

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[6] Specifically, the District Court found that there was an "underlying theme in the Federal Circuit's opinion: that Intergraph and Intel did not compete in the same market, and therefore, Intergraph has no maintenance of monopoly antitrust claim against Intel under Section 2 of the Sherman Act." *Id.* at 1292. Second. as an independent ground for summary judgment, the District Court followed the Federal Circuit's holding that Intel was entitled to withhold its intellectual property free from antitrust liability. This ruling was based on "the Federal Circuit's repeated statements dealing with a patentee's right to exclude others from its intellectual property." *Id.* at 1292.

[7] See Exhibit 2 hereto attaching relevant excerpts from Intergraph's brief on appeal.

involved in competitive decision-making.[8] Under paragraph 3 of the Protective Order, Intergraph was obligated to "show a copy" of the Order to its experts (which would include Professor MacKie-Mason) and to ascertain that he has "either read the order or is completely conversant with its terms, [and] understands that any violation of the Order shall constitute a contempt of Court ... [and that he] has agreed to abide by the terms of this Order." In addition, the Protective Order allowed the parties to mark as confidential sensitive business documents and mandates that "persons obtaining access to 'Confidential' documents pursuant to the terms of the Order may not use such documents or any information therefrom except in the preparation and trial of *this litigation* (including appeals and retrials), and shall not use such information for any other purposes (including business, governmental, commercial, administrative, judicial or personal matters)." (Emphasis supplied.)

13. On June 7, 1999, the district court entered a separate protective order governing non-party discovery. (See Exhibit 3.) The protective order recognized that third party discovery was taken in the FTC case, and provided for coverage of third party confidential material taken in the FTC case under the *Intergraph* protective order. (*Id.* Par. 3.) The order contemplated that there would be substantial third party discovery in the *Intergraph* case, and limited access to such discovery to outside counsel not involved in patent application work for a party, counsel's employees, and experts and consultants who first signed a stipulation to be bound by the order. In-house counsel was not granted access to third party confidential information. (*Id.* Par. 5.)[9] The Order states that in the event another court requests by subpoena third

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[8] The protective order was later amended on April 23, 1999 to extend access to two employees who executed agreements to use the information solely for purposes of the pending litigation, and an additional fifteen employees were granted access to technical documents to facilitate work on the patent case. *Id.*

[9] The Order also allowed access to the district court and authors or recipients of any third party confidential information.

party documents produced in the *Intergraph* case, the subpoenaed party must notify the third party that produced the documents and take any necessary action to protect the third party's confidentiality by filing an appropriate motion with the Alabama court. (*Id.* Par. 8.)

14. On August 12, 1998, the district court entered an order regarding automation of discovery and trial documents. (See Exhibit 4.) Pursuant to the court's order, each party was supposed to electronically code and image documents responsive to the other party's document requests at its own expense and to produce all relevant documents to the other side electronically.[10] Pursuant to the court's order, Intel began the process of imaging and coding the complete set of documents it intended to produce. However, early on in the process Intel recognized that it would simply be prohibitively expensive and time consuming for Intel to complete the imaging and coding project ordered by the court. Intel went back to the court and explained the impossibility of complying with the court's order.[11] The court noted that it understood the difficulties imposed by the order. Intel and Intergraph negotiated a resolution pursuant to which Intel agreed to image and code a subset of documents, focusing on documents from the files of individuals that Intergraph had noticed for deposition in the case and other documents selected by Intergraph.

15. The Court's order required the parties to code the documents electronically utilizing the following fields: Title, Date, Author, Recipient, Carbon Copy Recipient, Physical attachment Range, Type of Document (e.g., agreement, correspondence, technical, etc.) and Bates number. The Order

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[10] Imaging takes a photographic snapshot of a document and creates an electronic image of the document that later is placed on a CD. Imaging allows you to print an exact copy of the document from the CD.

[11] There was substantial briefing of the issue whether the court could require Intel to electronically image and code the documents in light of the expense, including a mandamus application to the Federal Circuit, which was denied.

also required the parities to produce the documents electronically.

16. Over the course of the litigation, Intergraph served approximately 16 separate document requests on Intel containing approximately 603 specific requests for production. Attached hereto as Exhibit 5 are copies of those document requests.[12]

17. Intel searched the files of approximately 599 individuals in response to the various document requests in the litigation, of which only five resided in Europe.

18. Most of the Intel employees searched had relevant documents responsive to multiple categories in Intergraph's document requests. By way of example, Intel searched the files of several of Intel's senior executives. Many of these executives had information relating to the specific business relationship between Intel and Intergraph, Intel's decision-making policies and procedures with regard to the Intergraph relationship, Intel's chipset, motherboard and graphics sub-systems (now discontinued) businesses, and general competitive analysis in each of the relevant product lines. Some such individuals also had documents discussing the accused Intel products that Intergraph alleged infringed its patents, and documents relating to the technologies embodied in the Intel patents relevant to Intel's patent infringement counterclaims against Intergraph.

19. Intel also searched the files of numerous employees that had direct dealings with Intergraph. Many of the documents from the files of these individuals dealt with the parties' direct business relationship. Many such employees also had copies of documents regarding various other issues in the case. Intel also searched the files of numerous engineers to respond to technical requests relating to the patent and warranty issues in the case. Although most of the documents from the files of these individuals related to technical issues,

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[12] Although the last request Intergraph served was numbered 625, Intergraph misnumbered the requests.

some such individuals possessed business-oriented documents relating to the various products at issue in the Intergraph case.

20. Virtually all of the documents that Intel produced to Intergraph were produced as they were kept in the usual course of business. Such documents were produced from the files of individual witnesses without relation to any specific document request propounded by Intergraph. In other words, the documents that Intel produced to Intergraph were not organized to correspond with the categories in any document request.[13]

21. The document requests Intergraph served on Intel sought documents on a wide range of issues, from the parties' patent claims and counterclaims, to the antitrust issues, to the various state law claims. As can be seen from the requests themselves (See Exhibit 5), approximately 60% of the requests sought documents related solely to the patent disputes between the two companies. A large portion of the remaining requests sought documents regarding the parties' direct business relationship, the specific disputes between the two companies, and products other than microprocessors.

22. For example, Request Nos. 56-67 sought all documents relating to the Intergraph patents in suit. Requests Nos. 430-509 sought, *inter alia*, file histories of the patents in suit (Request 430), communications by the inventors about the patents (Request 432), invention disclosures of the patents (Request 436), problems solved by inventions (Request 438), and all patents reviewed in connection with prosecution of patents in suit (Request 446). *See also* Request Nos. 420-428, 546-564 concerning Intel's counterclaim patents in suit.

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[13] Federal Rule of Civil Procedure 34 allowed Intel to produce the documents either as maintained in the regular course of business or by categories corresponding to specific requests.

23. Certain of the document requests sought highly confidential information concerning the inner-workings of Intel's microprocessor products. These documents were relevant only because Intergraph accused such Intel products of infringing Intergraph patents. *See, e.g.*, Request No. 278 seeking "all documents concerning the operation and/or structure of the Instruction Cache of the Pentium Microprocessor"; Request No. 287 seeking "all documents concerning the operation and/or structure of the data cache of the Xeon microprocessor"; Request No. 296 seeking "all documents concerning the operation and structure of the Writethrough Caching Policy of the Celeron Microprocessor"; Request No. 308 seeking "all documents concerning the flow or transfer of data into, out of, and/or through Fetch/Decode Unit, instruction pipelines, buffers, FIFO, and/or registers in advance of the first instruction decode stage of the Celeron Microprocessor"; Request No. 319 seeking "all documents Concerning Bus-Snooping operations and capabilities of the Xeon Microprocessor or any system that includes at least one Xeon Microprocessor"; Request No. 325 seeking "all documents concerning the PCI Write Cycle Snoop in the Celeron II Microprocessor or any system that includes at least one Celeron II Microprocessor."

24. Many document requests specifically sought information concerning the particular dealings between Intel and Intergraph. *See, e.g.*, Request No. 91 seeking "all documents concerning Intergraph or Intergraph products"; Request No. 215 seeking "all documents concerning Intel's decision in 1997 purporting to terminate non-disclosure agreements with Intergraph and requesting return of confidential information"; Request No. 218 seeking all documents concerning Intel's decision in 1997 refusing to permit Tectronix to supply test equipment to Intergraph; Request No. 217 seeking all documents relating to Intel's alleged decision not to assist Intergraph with the PIIX 4 chip; Request No. 221 seeking all documents relating to communications between Intel and Intergraph concerning Intergraph's entry into the digital media market; Request No. 250 seeking all documents concerning Intel's provision of motherboard assistance to Inter-

graph, Request No. 267 seeking documents concerning attempts to remedy bugs in Intel products sold to Intergraph; Request No. 272 seeking documents concerning warranty representations of Intel on the quality and fitness of Intel products.

25. Many other document requests related to products other than microprocessors. *See, e.g.*, Request Nos. 128 and 187-189, 536 asking with respect to motherboards for all documents relating to Intel's costs, margins, sales, prices, profitability and market share; Request Nos. 178-81 asking with respect to workstations for all documents concerning competition in workstations including Intel's plans or strategies, market share information and the relative strength or weakness of various companies; Request Nos. 182-185 and 539 seeking with respect to graphics subsystems systems all documents concerning competition including Intel's plans or strategies, market share information and the relative strength or weakness of various companies; Request No. 537 seeking all documents relating to each chipset sold by Intel including total sales, gross and net profits, costs of goods, general and administrative expenses, sales and marketing expenses, fixed unit production cost, variable costs, average cost and average pre-tax profit.

26. Of the 603 requests, 342 related to the patent issues in the case.[14] Only about 100 requests related to non-patent microprocessors issues, and many of these requests related to issues that were very different from AMD's allegations.[15] Approximately 81 requests related to products and technologies other than microprocessors. Approximately 20 requests related to patent licensing issues and royalties. The remaining requests related to the state law issues, the par-

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[14] *See, e.g.*, Request Nos. 1-68. 81-85, 174, 195-202, 278-329, 358-361, 386-429, 430-509, 510-514, 533-540, 541-543, 546-565, 571-614.

[15] See, e.g., Request Nos. 358-61 asking for documents sufficient to evidence all fixed asset or other capital expenditures relating to the manufacture of Intel processors together with related depreciation and asset disposition schedules.

ties' specific dealings, or other general requests for information.

27. Many documents produced to Intergraph came from Intel productions to the Federal Trade Commission. Beginning in 1997, the FTC looked into Intel's decision in 1997 not to supply three companies, including Intergraph, with Intel patented product samples and information after the companies sued or threatened to sue Intel and its customers with patent litigation. Intergraph's allegations in this regard were substantially the same as those examined by the FTC. The production of the FTC documents to Intergraph occurred many months before the Federal Circuit affirmed the legality of Intel's conduct. The Intergraph production also included, among other things, documents produced to the FTC in connection with Intel's acquisition of two graphics chip companies and a semiconductor manufacturing facility.

28. Intel also collected a large number of documents in direct response to Intergraph's requests. Overall, Intel made available to Intergraph for inspection approximately 1,435 boxes of documents totaling 2.75 million pages. Intergraph selected a substantial number of documents for copying (approximately 500,000 pages). Pursuant to an agreement of the parties, Intel delivered to IKON, a third party vendor of copying services, the documents Intergraph selected for copying from the larger set of documents made available for inspection. IKON handled the imaging and coding of the documents. Intel made deliveries of documents to IKON in multiple shipments. IKON presumably imaged the documents in the order in which they were received from Intel. IKON did nothing to collate the documents in any way other than to maintain them in the order as received from Intel. In particular, nothing was done to organize the documents to correspond with the categories in any Intergraph document request. The documents are thus imaged on the CDs as they were kept in the normal course of business.

29. There was a large volume of third party discovery taken in the *Intergraph* case relating to the patent, antitrust and state law issues. The following third parties received subpoenas in the *Intergraph* litigation: 3DFX Interactive,

Inc.; 3DLABS, Inc.; Acer Laboratories Inc. [Taiwan]; Acer Laboratories Inc., USA; Advanced Micro Devices. Inc.; Amdahl; American Megatrends, Inc.; Aopen America, Inc.; Apple Computer; Alpha Processor, Inc.; Asustek; Avance Logic; Atmel; ATI Technologies; Austek Microsystems Ltd.; Blur Studios, Inc.; Business Wire, Inc.; Ceita, Inc.; Centaur Technology, Inc.; Centropolis Effects, Inc.; Cirus Logic, Inc.; Compaq Computer Corp.; Convergent Technology, Inc.; Cyrix Corp.; Dell Computer Corp.; Diamond Multimedia Systems, Inc.; Digital Equipment Corp.; Elitegroup Computer Systems, Inc.; Encore Real Time Computing, Inc.; Evans & Sutherland Corp.; First International Computer of America; Fujitsu; Hal Computer Systems, Inc.; Hewlett-Packard; Hitachi American, LTD.; IBM Corp.; Integrated Device Technology, Inc.; Integrated Technology Express, Inc. [Taiwan]; Ispat Inland Management Association; Matrox; Metaflow Technologies, Inc.; Microstar International; Mitac USA, Inc.; Motorola; MSI Computer Corp.; Mylex Corp.; National Semiconductor; Inc.; NEC Electronics, Inc.; NStor Corp., Inc.; Number Nine Visual Technology Corp.; Nvidia Corp.; Phoenix Corp.; Phoenix Technology, Ltd.; Platinum Technologies; Rainbow Studios; Razorfish, Inc.; Rendition, Inc.; Rise Technologies Co.; S3 Inc.; Samsung Semiconductors, Inc.; Schulmberger Ltd.; SGI; Siemens Nixdorf Information Systems, Inc.; Silicon Graphics Systems Corp.; Silicon Integrated Systems [Taiwan); Silicon Integrated Systems Corp.; Silicon Spice; Soyo Computer, Inc.: STMicroelectronics, Inc.; Sun Microsystems, Inc.; Techfarm, Inc.; Texas Instruments; Tidalwave Microtech Inc. [Taiwan]; Transmeta Corp.; Trident Microsystems, Inc.; United Microelectronics Corp. [Taiwan]; Universal Scientific Industrial Co. Ltd.; Via Technologies. Inc.; Xerox Corp.; Xyratex International Ltd.; and Zilog, Inc. In addition, several third parties produced documents pursuant to subpoenas in the FTC case and these documents were made available to Intergraph under the coverage of the Intergraph non-party protective order. All together, more than 114,000 pages of documents were obtained from third parties in the *Intergraph* case.

30. Intel has no database of the documents contained on the CD's produced to Intergraph that organizes or categorizes the documents according to the categories in any specific Intergraph document request to Intel. Intel has never sought to create a subject matter index of the documents on the CDs.[16] As a result, there is no way, short of a document by document review, that Intel can cull from the documents on the CDs the subset of documents that might somehow be relevant to AMD's allegations of European antitrust violations. To conduct such a document by document review, Intel would have to expend substantial time and resources.

31. During the course of the litigation, Intergraph deposed sixty Intel employees. and received an additional volume of deposition transcripts of Intel employees from the FTC case. A substantial part of the testimony was not directed to the types of microprocessor issues alleged by AID. Forty-five third parties were also deposed in the litigation. In addition, ten experts were deposed. Of these, none was involved in the antitrust issues; all of the experts deposed were retained on the patent issues in the case.

32. I am also counsel of record for Intel in a patent infringement case Intel filed against VIA Technologies, Inc. in the Northern District of California. (Case No. C99-03062 WHA (JL).) In that case, Intel subpoenaed AMD for certain records relevant to the patent infringement issues in the case. AMD sought to quash that subpoena, and argued, among other things, that the governing protective order in that case was inadequate to protect AMD's documents because Intel's outside counsel might use the documents in connection with the EC investigation.[17] (Exhibit 6 at 10:12 -

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[16] Intel did create an index for those documents produced to the FTC that identified the specifications in the FTC's document requests to which Intel documents were responsive. This index cannot be used to cull out the subject matter of documents on the CDs in the Intergraph case, however, because a large percentage of the documents Intergraph selected were not part of the earlier FTC production.

[17] The protective order in question barred disclosure of any confidential documents or information to in-house counsel.

10:24). AMD asserted that policing outside counsel's compliance with the protective order "would be close to impossible." *Id.* at 10:24.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 29, 2001.

/s/_____
Darren B. Bernhard

PROOF OF SERVICE

I, the undersigned, am employed in the County of Alameda, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 1530 Page Mill Road, Palo Alto, California, 94304, in said County and State; I am employed in the office of Shelley K. Mack, a member of the bar of this Court, and at his direction, on October 29, 2001, I served the within: Declaration of Darren B. Bernhard in Support of Intel Corporation's Opposition to Advanced Micro Devices' Application for Order, by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown:

Patrick Lynch Esq.
David I. Hurwitz, Esq. — Attorneys for Plaintiff
O'Melveney & Myers LLP
400 South Hope Steret
Los Angeles, CA 90071
212 430-6000
213 430-6407

☒ BY MAIL: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ BY FACSIMILE: From facsimile machine telephone number (650) 849-5333, on the above-mentioned date, I served a full and complete copy of the above referenced document[s] by facsimile transmission to the person[s] at the number[s] indicated without error.

☐ BY PERSONAL SERVICE: I placed a true copy in a sealed envelope addressed to each person[s] named at the

address[es] shown and giving same to a messenger for personal delivery before 5:00 p.m. on the above-mentioned date.

☐ BY FEDERAL EXPRESS, PRIORITY OVERNIGHT NEXT DAY AIR: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for delivery by Federal Express, Priority Overnight. Pursuant to that practice, envelopes placed for collection at designated locations during designated hours are delivered to Federal Express with a fully completed airbill, under which all delivery charges are paid by Gibson, Dunn & Crutcher LLP, that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that the foregoing document(s) were printed on recycled paper. Executed on October 29, 2001, at Palo Alto, California.

/s/
Janel M. Chrestenson

ROBERT E. COOPER, SBN 035888
JOSEPH KATTAN (admitted pro hac vice)
SAMUEL G. LIVERSIDGE, SBN 180578
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

JAMES A. MURRAY (SBN 062227)
Intel Corporation
2200 Mission College Blvd.
SC4-202
Santa Clara, CA 95052-8119
Telephone: (408) 653-5370
Facsimile: (408) 765-4178

Attorneys for Respondent
INTEL CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ADVANCED MICRO DEVICES, INC., Applicant, v. INTEL CORPORATION Respondent	CASE NO. 01-7033 MISC WAI- **DECLARATION OF DR. NIGEL PARR IN SUPPORT OF INTEL CORPORATION'S OPPOSITION TO ADVANCED MICRO DEVICES' APPLICATION FOR ORDER** Date: November 19, 2001 Time: 2:00 p.m. Courtroom: Courtroom of the Honorable William A. Ingram

1. I am a partner in the law firm of Ashurst Morris Crisp, Broadwalk House, 5 Appold Street, London EC2A

2HA, United Kingdom. I have been a partner with the firm since 1994 and currently serve as head of the firm's competition and trade practice group. Following my LLB and LLM degrees in law, I was awarded a doctorate in European Community law in 1986 (my thesis subject was the legal reasoning of the European Court of Justice). Prior to entering private practice I taught European Community law at the University of Exeter, UK. I am joint author of the leading book on UK merger control law and practice, and regularly contribute to leading reviews on competition law. I have written many articles on competition law and presented numerous papers at conferences on competition law, most recently in June 2001 to the Regulatory Policy Institute at the University of Oxford, which was attended by current and former senior personnel from the US and EC competition enforcement agencies. I am a committee member of the UK Law Society's European Group and am listed as an expert in EC competition law in the publications 'Legal 500 – Who's Who in the Law', 'Chambers' Guide to the Legal Profession', 'Chambers Global, The World's Leading Lawyers' and 'Global Competition's An International Who's Who of Competition Lawyers.'

2. I am a solicitor of the Supreme Court of England and Wales and, amongst other things, I am qualified to practise before the European Commission, the European Court of First Instance and the European Court of Justice, as well as the UK Office of Fair Trading and the Competition Commission (the UK regulatory bodies in relation to competition law). I have represented a variety of clients before the European Commission in a broad range of competition law matters. I am presently counsel for Intel Corporation in connection with the Commission's current preliminary inquiry into the complaint lodged by Advanced Micro Devices, Inc. ('AMD') with the Commission against Intel. I base this Declaration upon personal knowledge of the matters set forth therein.

In this Declaration I will address the following:

(a) a basic background description of the European Union (paragraphs 3 to 4);

(b) an outline of the structure and functions of the European Commission, and the courts in which disputes with the Commission are adjudicated (the European Court of Justice and the Court of First Instance) (paragraphs 5 to 9);

(c) an explanation of the procedure and powers of the Commission in relation to competition law investigations under Articles 81 and/or 82, concluding with a summary of the non-adversarial (and non-adjudicatory) nature of the Commission's procedure and of the status of a complainant, which is not like a plaintiff or claimant in adjudicatory or adversarial proceedings (paragraphs 10 to 22);

(d) a description of the nature and status of the current activity of the Commission regarding AMD's complaint, explaining Intel's full co-operation with all information requests made by the Commission to date and the additional comment and information which it has voluntarily provided (paragraphs 23 to 28);

(e) an explanation of why the Commission is not an adjudicatory body, noting the case law of the European and English courts and the Commission's own statements regarding the proper characterisation of its procedures, which are distinct from litigation proceedings (paragraphs 29 to 33);

(f) an explanation of the paramount policy of confidential treatment of information in European competition cases and the absolute prohibition under EC law of the disclosure of the 'business secrets' of an investigatee to a complainant (particularly a competitor) (paragraphs 34 to 36); and

(g) a summary of the reasons why the Commission possesses neither adjudicatory authority nor uses adjudicatory procedures that are akin to the quasi-adjudicatory procedures of the U.S. Federal Trade Commission in certain matters, as described in the Declaration of James F. Rill (paragraphs 37 to 44).

The European Union

3. The European Union is comprised of 15 nations: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the UK, referred to as the 'Member States.' The term 'European Union' covers all aspects of the economic, financial, social and political agreements between the Member States. A core aspect of the European Union is the European Economic Community, which was created on 1 January 1958 by the Treaty of Rome (since amended and now referred to as the EC Treaty) and deals with the economic arrangements between the Member States such as competition/anti-trust, internal trade and the free movement of goods, services, persons and capital.

4. There are a number of institutions of the European Union, including the Commission of the European Communities ('the Commission'), the Court of First Instance ('CFI') and the European Court of Justice ('ECJ'). These institutions are independent of the Member States and exist under European Community ('EC') law. The EC legal system including its court system exists independently of the domestic legal systems of each Member State, although EC law is effectively part of the domestic law of each Member State and EC competition law can be applied directly by the domestic courts of the Member States.

The structure and function of the Commission

5. The Commission was established in 1958 under the Treaty of Rome. It has described its role as comprising three main functions:

> Because of its right of initiative, the Commission is charged with making proposals for all new legislation. . . . In its second function, the Commission acts as the guardian of the EU treaties to ensure that EU legislation is applied correctly by the Member States and that all citizens and participants in the single market can benefit from the level playing field that has been created. . . . In its third function,

> the Commission is the executive body of the Union responsible for implementing and managing policy.

('The role of the Commission' at http://europa.eu.int/comm/role_en.htm#1 attached hereto as App. 1[18]).

6. Decisions of the Commission are taken by the 20 Commissioners, who are appointed by the Member States. Member States typically appoint senior politicians to the Commission. However, once appointed, the Commissioners act independently of the Member States.

7. Articles 81 and 82 of the EC Treaty (attached hereto as App. 2) prohibit agreements which have as their object or effect the prevention, restriction or distortion of competition (Art. 81) and the abuse of a dominant position (Art. 82), in each case in so far as the agreement or conduct affects trade between Member States. Article 85 of the EC Treaty (App. 2) allocates responsibility for the enforcement of Articles 81 and 82 to the Commission. The various areas of responsibility of the Commission are divided into Directorates General (or 'DGs'). Each of these DGs has the responsibility for specific policy areas, such as economic and monetary policy, trade, budget, environment, taxation, transport and energy, agriculture, etc. One of these DGs, the Competition Directorate General (commonly referred to as DG COMP), is charged with responsibility for the enforcement of Articles 81 and 82. DG COMP is empowered to investigate companies for breaches of Articles 81 and 82 and to order companies that it charges with such breaches to end agreements or conduct that breach these Articles, pursuant to a process discussed in paragraphs 10 to 22 below.

8. Certain of the Commission's enforcement actions are subject to judicial review (if such a review is launched) under Article 230 of the EC Treaty (attached hereto as App. 3). Such reviews are made to the Court of First Instance ('CFI'), which acts as the court of original jurisdiction for

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[18] Materials cited in this declaration are reproduced in the Appendices to this declaration.

direct actions under EC law (Art. 225(1) EC Treaty, attached hereto as App. 3). The CFI consists of 15 members, appointed from the senior judiciary of the Member States. Any legal person which is affected directly and individually by a Commission decision that is subject to review, which in some circumstances can include certain third parties, may seek review by the CFI. (Art. 230(4) EC Treaty, App. 3).

9. The European Court of Justice ('ECJ') is the ultimate reviewing court in actions under EC law including matters of EC competition law. The ECJ consists of 15 judges, assisted by eight advocates general who are also members of the Court (Arts. 221 and 222 EC Treaty, App. 3). The role of the advocates general is to deliver to open court fully reasoned opinions on legal and policy issues before the Court to ensure that the principles of EC law are observed, and to recommend the final ruling of the ECJ. Their opinions are an influential source of law which are cited in submissions to the ECJ, CFI and national courts of the Member States on points of EC law.

The procedure and powers of the Commission in relation to competition law investigations under Articles 81 and/or 82

10. The principal legislative measures setting out the procedural rules for the implementation of Articles 81 and 82 are the First Regulation Implementing Articles 81 and 82 of the Treaty, (Council Regulation 17/62/EEC OJ 1962 L 13/204) ('Reg. 17') and Commission Regulation (EC) No 2842/98 (OJ 1998 L 354/18) ('Reg. 2842/98').[19] (These regulations are appended to this Declaration as App.s. 4 and 5).

11. The Commission has the power to investigate the conduct of companies, referred to in Articles 81 and 82 (App.

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[19] Articles 81 and 82 of the EC Treaty had been numbered as Articles 85 and 86 prior to the amendment of the EC Treaty by the Treaty of Amsterdam in 1997. Certain of the cited documents have not been amended to reflect the new numbering. For convenience, they are referred to in this Declaration by reference to the new Article numbers.

2) as 'undertakings', following notifications to the Commission by parties to an agreement, complaints by third parties, or at the Commission's own initiative. DG COMP's practice is to conduct initial inquiries to gather material about the market concerned and the agreement or conduct in question before deciding whether to commence a formal investigation. This fact finding stage constitutes a preliminary phase to enable the Commission to evaluate whether a breach of Article 81 or 82 may have occurred. If the Commission has reason to believe a breach has occurred, it may launch a formal investigation, although it is under no obligation to do so and a complainant cannot require the Commission to investigate a complaint (Case T-24/90 *Automec -v- Commission* [1992] ECR II-2223 at ¶¶ 75 and 76, attached hereto as App. 6).

12. DG COMP's inquiries and investigations are carried out by case officers, who are career civil servants whose job is to conduct inquiries and investigations and prepare draft final decisions regarding enforcement of Articles 81 and 82 (App. 2) for consideration and adoption by the Commission.

13. In conducting its inquiries, as well as its formal investigation, the Commission has extensive powers to gather the necessary information itself. (Case 53/85 *AKZO Chemie BV -v- Commission* [1987] 1 CMLR 231, Opinion of AG Lenz at page 248, attached hereto as App. 7) ('in competition proceedings the Commission has powerful means of coercion at its disposal in order to carry out its investigation'). The Commission is empowered to conduct 'dawn raids,' or on-site investigations at the premises of companies, without prior notice. (Reg. 17, Art. 14, App. 4). It is also empowered to 'obtain all necessary information' from 'undertakings and associations of undertakings' (Reg. 17, Art. 11(1), App. 4), which can comprise both documents and written answers to questions. The Commission begins the information gathering process by issuing a request for information under Article 11(3) of Reg. 17 (App. 4), which is commonly referred to as an 'Article 11 request.' Where a company fails to provide the requested information, the Commission will require the company concerned to provide the information by a specific

date. (Reg. 17, Art. 11(5), App. 4). The Commission is empowered to sanction companies that fail to comply with Article 11(5) decisions with fines or 'periodic penalty payments' for continuing failures to provide information. (Reg. 17, Arts. 15(l)(b), 16(l)(c), App. 4).

14. Accordingly, although the input of complainants is welcomed by DG COMP where it contributes to the fact-gathering and verification process, in no way could the Commission be said to be reliant upon such input. In particular, it is not the practice of the Commission to request a company to provide documents that would have to be obtained in turn from a third party since the Commission can request the documents from the relevant company directly using an Article 11 request if necessary. I am not aware of any case where the Commission has relied on a complainant to provide it with the business records of the investigatee. In this respect, it is important to note that there are no limits on the number of Article 11 requests that the Commission may issue in a single inquiry to the investigatee, any complainant, or third parties. It is quite common for the Commission to issue multiple Article 11 requests to particular companies during a pre-investigation inquiry or a formal investigation (for example to verify arguments submitted by the investigatee in response to the statement of objections (discussed below)).

15. Throughout its preliminary inquiries and during the formal investigation the Commission is required to respect the strict confidentiality of 'business secrets' which it has received from all parties – including the investigatee and the complainant. (Art. 20, Reg. 17, App. 4 and *AKZO, supra*, App. 7). A company that provides confidential information or documents to the Commission has the right to request that the Commission treat them as 'business secrets' to prevent third parties from obtaining strategic information on their essential interests and on the operation or development of their business'. (Commission notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles [81] and [82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council

Regulation (EEC) 4064/89 (OJ 1997 C 23/3), Section 1A(1) paragraphs 1 and 2 (referred to herein as 'Commission's notice on access to the file'), attached hereto as App 81. (See also *AKZO*, *supra*, at ¶ 28, App. 7) ('[a] third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets').

16. Where the Commission has reason to believe that there has been a breach of Article 81 and/or 82, the Commission will commence a formal investigation by issuing a statement of objections ('the SO'). The SO sets out the Commission's understanding of the facts and its legal reasoning, and has annexed to it the documentary material on which the Commission wishes to rely. The investigatee has the right (but no obligation) to reply in writing to the SO (Reg. 2842/98, Art. 4(1), App. 5), and to provide factual support as well as legal argument and expert economic evidence for its position. The Commission will also provide a copy of the SO to a complainant, although this must be a non-confidential version of the SO, with business secrets belonging to the investigatee (or other third parties) having been redacted. (Art. 7, Reg. 2842/98, App. 5). The Commission may not disclose the business secrets of the investigatee to a complainant under any circumstances. (See also *AKZO*, *supra*, at ¶ 28, App. 7, and paragraph 34 below). The complainant has a right to make a written response to the SO (Art. 7, Reg. 2842/98, App. 5).

17. After an SO is issued, the investigatee will be given access to all documents which have been gathered by the DG COMP case officers except for the business secrets of other companies, internal Commission documents (e.g. memoranda between case officers and internal views) and other confidential information (e.g. commissioned market studies). (Commission's notice on access to the file, section I ¶ 1, App 8). Access is provided so that the investigatee can properly respond to the SO having seen all of the documents making up the Commission's file. The complainant has no right of access to the Commission's files unless its complaint has been formally rejected, in which case it will have access to those documents on which the Commission has relied in re-

jecting the complaint. (Commission's notice on access to the file, section II D(1) ¶ 2, App. 8). Even at that point, however, the complainant must not be given access to documents containing the investigatee's business secrets, as the ECJ has held in *AKZO* (*supra*, at ¶ 28, App. 7), and as the Commission has confirmed more recently in its Notice on Access to the File (section II D(1) ¶ 2, App. 8).

18. If an SO has been issued, the investigatee has the right to request an opportunity to explain its position to DG COMP orally (Art. 5, Reg. 2842/98, App. 5). Under Article 12(3) of Reg. 2842/98, oral hearings are not public (Art. 12(3), Reg. 2842/98, App. 5). The Commission has the discretion to allow a complainant and/or certain third parties to participate in the oral hearing if they so request. (Arts. 8 and 9(2) and (3), Reg. 2842/98, App. 5). The hearing is organised by the hearing officer who is responsible for supervising its conduct (Art. 10, Reg. 2842/98, App. 5), and whose key role under the current recently amended procedure is to ensure that various rights are respected. (Art. 1, Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162/21), attached hereto as App. 9). If attendees are heard together rather than separately, the Commission must have regard to the need to protect business secrets (Art. 12(3), Reg. 2842/98, App. 5).

19. The hearing officer is responsible for ensuring that the rights of confidentiality are respected and in practice this means excluding attendees from those parts of the hearing in which the investigatee's or other attendees' business secrets are discussed. (Art. 12(3), Commission decision of 23 May 2001 on the terms of reference of hearing officers, App. 9). Whilst the hearing officer is responsible for a number of case management decisions as regards the conduct of the investigation in order to ensure that procedural rights are respected, he or she does not exercise any decisional authority in relation to the substantive matters under investigation. For example, the hearing officer's report on the oral hearing is not a ruling on the issues, but covers 'procedural issues, including disclosure of documents and access to the

file, time limits for replying to the statement of objections and the proper conduct of the oral hearing' (Art. 13(1), Commission decision of 23 May 2001 on the terms of reference of hearing officers, App. 9). The report is typically a short statement that the various procedural requirements have been complied with.

20. Following the filing of the investigatee's reply and the oral hearing, DG COMP's investigating case officers prepare a draft decision for the Commissioner in charge of DG COMP. If the Commission intends to clear or exempt the agreement or conduct in question, DG COMP must publish a notice setting out any negotiated conditions for the clearance and inviting comment from any third party (including a complainant). (Art. 19(3), Reg. 17, App. 4). Following consultation with an advisory committee comprising representatives of the Member States, the draft is submitted to the Commissioner in charge of DG COMP for approval, and subsequently becomes effective upon approval by the Commission acting as a collegiate body. Where the Commission believes that there has been a breach of Articles 81 or 82, the decision will usually require the respondent to bring an end to the agreement or conduct in question (Art. 3, Reg. 17, App. 4) and may impose fines and periodic penalties. (Arts. 15 and 16, Reg. 17, App. 4).

21. It is important to recognise several important attributes of the Commission's process:

(a) at all stages the Commission retains the initiative in gathering facts and documents and in deciding whether to take its inquiries further;

(b) the Commission has extensive powers under Articles 11 and 14 of Reg. 17 (App. 4), to gather information and documents and does not rely on the complainant to act as its source of documents;

(c) the process does not provide for taking evidence or testimony under oath at any stage of the process, including any oral hearing;

(d) whilst the Commission can compel the provision of documents and written answers to its questions by busi-

nesses under Article 11 and actively seek them out under Article 14 of Reg. 17 (App. 4), it has no ability to compel companies (including the complainant) to require specific employees with personal knowledge of any disputed matter of fact to participate in any hearing or to submit to interviews, nor can it directly compel the individuals to do so;

(e) As to those persons who participate in a hearing, there is no process of cross examination. The DG COMP case officers may ask questions of the participants at the oral hearing, and DG COMP may seek to verify information provided by a company by asking questions to other companies that are present at the hearing, or subsequently via written questions but they are not required to do so;

(f) there is no process akin to discovery. Where a formal investigation is launched, the investigatee alone has a right of access to the Commission's file but no right to view the facts and documents in the possession of a complainant or any other third party, no matter how relevant. Neither the investigatee nor any other person may seek documents or other information from another person;

(g) there are no rules of pleading; submissions are drafted in such form as the companies choose. There is no requirement that the Commission share submissions from one person with another person, including the investigatee, other than in the limited context of the process of access to the Commission's file described above;

(h) the Commission does not have any rules of evidence applicable to its investigations, including oral hearings;

(i) the Commission does not make adjudications of the rights of litigants; it investigates and takes enforcement decisions in relation to the investigatee;

(j) there is no separation of functions within the Commission between investigator, prosecutor and ultimate decision maker; the Commission does not employ judges or any other independent person to decide disputes between its investigating case officers and investigatees, and the investigating case officers in fact prepare the Commission's decision.

22. As regards the position of a complainant in the Commission's procedures, a complainant is simply a third party or bystander to the Commission's investigation (albeit one with particular rights), and is not like a plaintiff or claimant in court proceedings:

(a) the ECJ's Advocate General Lenz stated 'The complainant is limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities'. (*AKZO*, *supra*, at page 248, App. 7.) In fact, complaints are only one of three ways in which an investigation by DG COMP might commence;

(b) the ECJ has held that complainants have no entitlement to be involved in the discussions which may take place between an investigatee and the Commission to reach an acceptable position which is not in breach of EC competition law, holding that the right of the investigatee to discuss matters with the Commission in this way 'would be imperilled if the complainants were to attend the negotiations or be kept informed of the progress made in order to submit their observations on the proposals put forward by one party or the other.' (Cases 142 and 156/84 *British American Tobacco and Reynolds -v- Commission* [1987] CMLR 4487 at ¶ 24, attached hereto as App. 10).

(c) a complainant has no right to require the Commission to launch a formal investigation or to reach a decision as to whether the complained of agreement or conduct constitutes a breach of Articles 81 and/or 82 (*Automec*, *supra*, at ¶ 75 and 76, App. 6);

(d) a complainant is under no general obligation to provide documents or other information to the Commission: it would only have such an obligation if it received an Article 11 request, and then only as regards the subject matter of the request;

(e) I am not aware of any case where the Commission has relied on a complainant to provide it with the business records of the investigatee, as it has extensive information gathering powers of its own;

(f) where an investigation is commenced by the issuance of an SO, a complainant has no formal rights to any documents or information except the right to receive a copy of the non-confidential version of the SO. It has no rights of access to the Commission s file;

(g) where an investigation is not commenced or is terminated and a complaint has therefore been formally rejected, a complainant acquires only limited rights of access to the Commission's file, which does not include access to the investigatee's confidential business records;

(h) at all times the Commission is under a strict obligation not to provide any business secrets of the investigatee (or third parties) to the complainant.

The nature and status of the current Commission activity regarding AMD's complaint

23. On or about 23 October 2000, AMD submitted a complaint to the Commission regarding Intel's conduct. On or about 18 January 2001, the staff of DG COMP advised Intel of the complaint's filing and sent an Article 11 request to Intel. The Article 11 request asked Intel to provide comprehensive responses to 30 detailed written questions and to provide DG COMP with various types of documents. The Commission did not provide Intel with a copy of AMD's complaint or identify AMD's specific allegations at that time, but provided a 10-line summary of the nature of the complaint in its covering letter, and brief summaries of AMD's claims (typically consisting of two or three lines) in the preambles to the Article 11 questions themselves.

24. On 28 February 2001, Intel provided the Commission with a 91-page reply that fully answered the Commission's written questions, and supplied to the Commission documents supporting the factual statements in that reply. Intel could not address AMD's specific allegations in that reply because at that time it had not received a copy of AMD's complaint. The Commission subsequently asked Intel to redact confidential information from this reply to enable the Commission to supply the redacted copy to AMD. Intel provided this redacted 'non-confidential' version on or

about 20 April 2001 and understands that the reply has been provided to AMD.

25. On or about 1 June 2001, Intel received from the Commission for the first time a redacted non-confidential copy of AMD's 152-page complaint. The redacted copy did not disclose the identities of the lawyers and law firms representing AMD. The redacted complaint made more specific allegations than could be discerned from the summary in the Commission's Article 11 request. In particular, the complaint alleged specific conduct in relation to specific companies and organisations that could not be discerned from the Article 11 request. Most of the allegations in AMD's complaint, and all of AMD's specific allegations of conduct vis-à-vis particular third parties, thus only became known to Intel and its counsel after the receipt of the complaint on or about 1 June 2001.

26. Intel provided to the Commission a detailed 129-page response to the complaint on or about 15 August 2001, in which it addressed and rebutted AMD's allegations. The response was accompanied by hundreds of pages of exhibits that substantiated the factual statements made in the response. Intel is currently working on creating a non-confidential version of this response from which its confidential business information has been redacted so that DG COMP staff may if they wish provide a copy to AMD (as noted above, this is at the Commission's discretion).

27. Intel has cooperated fully with the DG COMP staff and has responded promptly and fully to all of its inquiries. Since Intel's submission of its response to AMD's complaint, the Commission has not made any further Article 11 requests to Intel. Indeed, the only Article 11 request from the Commission in relation to AMD's complaint was the original request to which Intel replied on or about 28 February 2001. No statement of objections has been issued and the Commission's process remains at the stage of preliminary inquiries.

28. The great bulk of AMD's specific allegations regarding sales and marketing conduct which are the subject matter of its complaint (and which are summarised in AMD's

Application) involved Intel's relations with customers in Europe. All of the Commission's questions in its Article 11 request to Intel regarding sales and marketing conduct asked Intel to address marketing practices vis-à-vis 'OEMs and retailers within the EEA,' referring to the European Economic Area that includes the European Union and certain other European states. Both AMD's allegations and the Commission's questions regarding specification development groups relate to the United States.

The EC Commission is not an adjudicatory body

29. The administrative nature of DG COMP's procedure under Articles 81 and 82 has been summarised above (paragraphs 10 to 22). The nature of these procedures has been considered by the Commission itself, the ECJ and the English courts. The Commission has stated that its 'procedure relating to restrictive practices and abuse of a dominant position is administrative and not judicial; it must not be turned into a trial.' (11th Report on Competition Policy (1981) at ¶ 27, attached hereto as App. 11). The Commission has also emphasised that it (and the Member State's national competition authorities), 'do not set out to decide disputes between parties, but rather to guarantee the maintenance of a system ensuring that competition is not distorted.' (White Paper on modernisation of the rules implementing Articles [81] and [82] of the EC Treaty, (published on 28 April 1999) at ¶ 91, attached hereto as App. 12).

30. The Commission neither adjudicates disputes between litigants nor acts as a neutral body for resolving disputes between an investigatee and the Commission's case officers. Whilst the Commission endeavours to be fair in its actions, the case officers act as both investigators and prosecutors and prepare the Commission's decision. There is no independent decision maker within the Commission which rules on matters of fact or law which are in dispute between the DG COMP case officers and the investigatee (or any other third party). There is no separation between, nor separate representation for, DG COMP decisionmakers and

its investigative/prosecutorial arm, as these are one and the same.

31. The Commission has rejected suggestions that autonomous administrative law judges should be appointed to undertake the decision making role of DG COMP:

> Mention has been made in some interested quarters of the introduction of administrative law judges who are autonomous and are appointed in particular to the Federal Trade Commission (FTC) and who in the United States hold, like the Commission, powers of investigation and decision in the field of competition. These administrative law judges are themselves empowered to carry out investigations and [p]ut forward decisions to the FTC. The introduction of such an authority which, moreover, does not seem to have proved fully satisfactory, at any rate in the competition field, in the United States, does not seem compatible with the institutional scheme of the Treaty. In addition, it could well make procedures in individual cases even more complicated and prolonged.

(11th Report on Competition Policy (1981) at ¶27, App. 11).

32. The ECJ, the ultimate arbiter in matters of EC law, has emphasised that the investigations of the Commission are not adversarial, holding in relation to an investigation under Articles 81 and 82:

> such an investigation ... does not constitute adversary proceedings between the companies concerned; it is a procedure commenced by the Commission upon its own initiative or upon application, in fulfillment of its duty to ensure that the rules on competition are observed.

(*British American Tobacco, supra*, at ¶ 19, App. 10). Advocate General Lenz, a member of the ECJ, had made similar comments in his opinion for the Court in *AKZO* (*supra*, at page 248, App. 7) and further emphasised that complainants are not considered parties in the Commission's enforcement process:

> Competition proceedings before the Commission are . . . not to be regarded as adversarial proceedings between the complainant and the [investigatee]. The complainant is limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities. The competition proceedings themselves are conducted by the Commission.

(*AKZO, supra*, at page 248, App. 7).

33. Courts in England have addressed the question of the proper characterisation of the Commission's functions in relation to adjudicative functions. In *Hasselblad (GB) Ltd v. Orbison*, ([1985] 1 All ER 173, attached hereto as App. 13), the English Court of Appeal, England's second highest court, ruled that 'the Commission is acting in a manner which is dissimilar to that of either civil or common law courts of justice and that its attributes are dissimilar to such courts.' (*Id.* at 181). The Court added: 'This is not a criticism of the Commission and its procedures. It is merely an acceptance that the Commission and its procedures fall into a different category better labelled as administrative *rather than judicial or quasi-judicial.*' (*Id.*) (emphasis added).

The paramount policy of confidential treatment of information in European competition law cases

34. A significant volume of commercially sensitive information is normally received by the Commission in the course of its inquiries from a wide range of companies which often include direct competitors (as is the case with Intel and AMD). As discussed above, the Commission is required to respect the confidentiality of documents containing business secrets and there is an absolute prohibition on the release of the business secrets of an investigatee to a complainant. The ECJ has ruled:

> [A] third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets. Any other solution would lead to the unacceptable consequence that an undertaking might be inspired to

> lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets.

(*AKZO, supra*, at ¶ 28, App. 7). The Court reinforced this holding in *Samenwerkende Elektriciteits-Produktiebedrijven NV -v- Commission* (Case C-36/92 [1994] ECR I-1911, attached hereto as App. 14), where the ECJ repeated its concern over 'the extremely serious damage which could result from improper communication of documents to a competitor' (*Id.* at ¶ 38).

35. As noted in paragraph 21(f) above, there is no discovery process in DG COMP's procedures because the Commission's investigation is not an adversarial process conducted between opposing litigants (whether between private litigants or between a public body and a private litigant). To the extent that the Commission wishes to have a company comment on another company's assertions, it will do so either by asking for answers to specific questions or by providing redacted, non-confidential versions of information provided to the Commission. This is a matter for the Commission's discretion, and, save for the requirement to provide the SO to the investigatee and (in non-confidential form) to the complainant, the Commission may decide whether and when to ask any person for additional information or for commentary on certain assertions.

36. The importance of respecting the confidentiality of business secrets has arisen as an issue in the arrangements for co-operation between DG COMP and the US antitrust enforcement authorities. In 1991 it was agreed in principle between the Commission and the US government that 'it is in their common interest to share information that will ... facilitate effective application of their respective competition laws ....' (Agreement between the Government of the USA and the Commission of the European Communities regarding the application of their competition laws. OJ 1995 L 95/47, at Article III(1), attached hereto as App. 15). Pursuant to this agreement, information including business or trade secrets obtained by the Commission 'is not be disclosed to the US antitrust authorities save with the express

agreement of the source concerned.' (Commission Report to the Council and the European Parliament on the application of the agreement between the EC and the government of the USA regarding the application of their competition laws 1 January 1997 to 31 December 1997 at page 5, attached hereto as App. 16). Thus, the Commission will protect an investigatee's confidential information even from fellow antitrust enforcers in the United States.

The European Commission neither possesses the adjudicatory authority nor uses the adjudicatory procedures of the US Federal Trade Commission

37. I have read the Declaration of James F. Rill in Support of Intel Corporation's Opposition to AMD's Application. Based on the information regarding the adjudicatory powers, procedures, and practices of the US Federal Trade Commission ('FTC') set out in paragraphs 9 to 16 of Mr. Rill's Declaration, regarding which I do not proffer my own opinion, the European Commission neither possesses the adjudicatory powers of the FTC nor uses any procedures of the type described in Mr. Rill's declaration in relation to FTC adjudications.

38. Mr. Rill states that the FTC's adjudicative proceedings are formal adversary proceedings conducted by a neutral adjudicator (Rill Decl. ¶ 11). By contrast, Commission investigations cannot be characterised as adjudicative or adversarial for the reasons set out in paragraph 21 above and are not considered to be so by the Commission, the European Court of Justice or the English courts (see paragraphs 29 to 33).

39. Mr. Rill describes the appointment of the Administrative Law Judge (Rill Decl. ¶ 12) who conducts trial-like proceedings. There is no equivalent body or person involved in the procedures relating to the investigations and decisions of the Commission, as is discussed at paragraph 21(j) above. The creation of such a role has been specifically rejected by the Commission (see paragraph 31).

40. Mr. Rill also refers to the separation of functions between the FTC's investigative staff and the Administrative

Law Judge who presides over the proceedings, between the ALJ and the Commission itself, and between the Commission and the investigative staff upon commencement of the adjudicatory proceedings (Rill Decl. ¶ 11). There is no such separation of functions within the European Commission as discussed at paragraphs 21(j) and 30 above.

41. Mr. Rill describes the rights and obligations of the respondent in an FTC action, including the obligation to answer the FTC's complaint, the entitlement to file motions and the right to discovery of the respondent and other parties (Rill Decl. ¶ 13). There are no corresponding rights or obligations in European Commission investigations. The investigatee is entitled but not obliged to answer the Commission's statement of objections (see paragraph 16), and the investigatee has no entitlement to discovery against any complainant or other third party (see paragraph 21(f)).

42. Mr. Rill describes the various rights of a party to the proceedings to obtain documentary and testimonial evidence (Rill Decl. ¶ 13). The only entity with powers to obtain information and documents from another entity in a European Commission investigation is the Commission itself (see paragraphs 13 and 14), and no party has rights to obtain evidence or testimony under oath (see paragraphs 21(c) and (d)).

43. Mr. Rill describes the rights of respondents in the hearings in FTC adjudications, including the right to cross examine witnesses, the use of rules of evidence to exclude unreliable material, and the ability to subpoena third parties, including the complainant (Rill Decl. ¶¶ 13 and 14). European Commission investigations are not, as the European Commission itself has emphasised, akin to a trial (see paragraph 29), and no one has a right to cross examine any other attendee at an oral hearing (see paragraph 21(e)). There are no rules of evidence and no rules of pleading in Commission investigations (see paragraphs 21(g) and (h)). There is no ability to compel anyone to testify (see paragraph 21(d).

44. Mr. Rill states that the Administrative Law Judge renders an initial decision which is prepared independently

by the ALJ upon closing of the hearing record, and the Commission's subsequent adjudicative process upon appeal of the initial decision, which is again made independently under *ex parte* rules that bar any communications with the investigative staff (Rill Decl. ¶ 15). In a European Commission investigation, the Commission's decision is drafted by the investigative staff and it is normal for the staff to communicate throughout the process with the Commissioner in charge of DG-COMP (see paragraph 20). Although the hearing officer will prepare a report, it is restricted to issues of procedure (see paragraph 19).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 25th day of October 2001, in Exeter, United Kingdom.

/s/ Nigel Parr
Nigel Parr LLB, LLM, PhD
Solicitor of the Supreme Court
of England and Wales

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ADVANCED MICRO DEVICES, PLAINTIFF V. INTEL CORPORATION, DEFENDANT.	C-01-7033-MISC SAN JOSE, CALIFORNIA DECEMBER 6, 2001

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM A. INGRAM
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff:

O'MELVENY & MYERS
BY: PATRICK LYNCH
DAVID I. HURWITZ
400 SOUTH HOPE STREET
LOS ANGELES, CALIFORNIA
90071

For the Defendant:

GIBSON, DUNN & CRUTCHER
BY: ROBERT E. COOPER
333 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA
90071

Also Present: INTEL CORPORATION
BY: JAMES A. MURRAY
2200 MISSION COLLEGE BLVD.
SANTA CLARA, CALIFORNIA
95052

Official Court Reporter: IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

SAN JOSE, CALIFORNIA DECEMBER 6, 2001

PROCEEDINGS

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: This is case number C-01-0733 Miscellaneous, Advanced Micro Devices versus Intel Corporation.

Counsel, would you please state your appearances.

MR. LYNCH: Patrick Lynch and David Hurwitz for Advanced Micro Devices.

THE COURT: Thank you.

MR. COOPER: And Bob Cooper and Jim Murray for Intel.

THE COURT: All right. Now, Mr. Lynch, I guess you're up.

MR. LYNCH: Thank you, Your Honor.

Your Honor, AMD believes that Intel has violated the law of Europe, the law of the European Community as it relates to monopolization.' The only tribunal that exists in Europe to give relief for these violations and put a stop to them is the European Commission.

AMD, if it had its dredgers would much prefer to be in front of a U.S. type of administrative body that has all of the processes of the, of the U.S. discovery rules but that, that is not the law in Europe.

Section 1782 of the judicial code is designed to enable a litigant, any litigant, but particularly a U.S. litigant, to enlist

the aid of the federal courts to obtain discovery necessary to make its way in a foreign proceeding and that's what we have asked here today.

We have asked for these documents because, first of all, it's a precisely described set of documents, documents that we know to exist on, on electronic, in the electronic form on CD's that were produced in the *Intergraph* litigation. We know it's highly relevant to the subject matter of our proceeding in Europe. The materials that even are submitted by Intel indicate that in the public proceedings in the *Intergraph* case many of these documents were cited to the court in support of Integraph's claim of monopoly and monopoly power and it is those documents in particular that we are anxious to get.

As to those documents we do not believe that Intel can make any serious claim that those documents are protected by U.S. or European claims of confidentiality because under U.S. law when documents are presented to a court in support of a motion for summary judgment there is a presumption that those documents become -- go into the public domain.

But in any case, if there is a need for protection of some of Intel's documents there is ample means to do that. The issue here is not what is the appropriate precise protection for some sets of these documents but whether this is a proceeding that AMD can come to the federal courts and get necessary information.

Intel has argued that the European Commission is not a tribunal within the meaning of the statute. That argument is contrary to the expectation of the principal expert who assisted Congress in drafting the statute and it's contrary to common sense. It is true that the European Commission is not exactly identical to the Federal Trade Commission or to any U.S. institution, but the obligation of the European Commission is to make findings in individual cases on the basis of evidence as to whether there has been a violation of the law.

The European procedure gives to AMD a vested right to explain to that agency and a vested right and a right to take an appeal to the European Court of First Instance or the European Court of Justice. If the Commission believes AMD has not acted or acted inappropriately on the evidence before it and in that respect it is a tribunal that is subject to substantially the same due process procedures that exist in the United States, with reference, for example, to the Federal Trade Commission.

In fact, as a complainant, AMD has more rights for the judicial review of actions in Europe than it would to the Federal Trade Commission. So we believe that clearly the congressional intent was, almost explicit congressional intent was to make this statute available in proceedings before the European Commission and it's something of an affront to the, to the privilege of the Europeans to define their own institutions to claim that the institution, the administrative procedure that they have adopted is in some sense not a tribunal.

Secondly, it's argued that AMD is not an interested party—interested person, excuse me. The statute says interested person not interested party, doesn't require party status.

However, as I indicated under the rules of procedure in Europe and by the way these rules were put before Your Honor both by AMD and even in even greater detail by Intel, AMD has clear vested rights in the proceedings which is pending before the European Commission. It is entitled to submit a claim to the Commission. It is entitled to submit evidence to the Commission.

THE COURT: In the declaration from Dr. Par that latter thing is a little clouded in my mind. I understand I think what he said was that it's not contemplated that any initial production or request for production will emanate from anybody but the Commission and had I read that to mean that it would be not in accordance with contemplated practice that a complainant in the position of AMD could initiate that,

they could undertake to obtain things if requested but now that may be a misunderstanding.

MR. LYNCH: Your Honor, I believe the procedure works this way: the Commission has its own powers of investigation and it can demand production of documents from the parties or from any other party in its jurisdiction under the so-called Article 11 power.

The Commission could ask for these documents in its own right. We have, in fact, suggested that the Commission, that it should do so.

But the Commission is required to entertain any request of evidence by AMD or by Intel. So we are in the posture of a party, any party would be in a U.S. court, that is the court doesn't necessarily reach out and conduct discovery on its own initiative but the parties have a right to go and seek evidence and to submit evidence in support of their claim.

When I started and said that, you know, at least speaking as a U.S. lawyer it would be my drudgers that we would have the kinds of rights to prosecute the case that we would have in the United States. Those rights don't, we don't have discovery rights in Europe. There's no dispute about that, but we do have the right which the U.S. government has given us here in the United States to invoke section 1782.

If the court grants our application we clearly have the right to take the evidence that we obtain to the Commission and the Commission has an obligation to entertain that evidence and, for example, if it makes a decision, ultimately, either way, its decision must take account of all of the evidence, it must make a written record of the—of its process in either entertaining or rejecting the evidence submitted.

If we believe after the fact that that decision is incorrect, AMD has the right under European procedure to go to the Court of First Instance and challenge to either annul the Commission's action or to compel the Commission to take action if its failed to do so. Those rights certainly make AMD an interested party within the meaning of the U.S.

statute which says that any interested party, not a person rather, but any interested person may seek this relief.

Now, in theory, as I said earlier, these documents are at least partially in the public domain. These are documents that were submitted to a federal court in a contested proceeding over summary judgment and there's a common law presumption that at that point they go into the public domain. There are, because we only know of the documents that are in the public record, we have asked for production of the, of the documents that were produced in discovery going beyond those that were in the public record but for purposes of 1782 and for purposes of an order to compel Intel to respond, even if it were only limited to the public domain documents, that 1782 has given us this right to seek evidence.

If the court were to hold that we can't invoke that right, then our ability to present the European Commission with the full picture, with all of the evidence that would support our claim of wrongdoing will be curtailed.

Now, that is in part that's the choice that the European governments have made in that they don't give us discovery rights in Europe and we have to live with that but Congress didn't make that same choice. Congress made the choice that a party interested in a foreign proceeding should be entitled to get discovery with the help of the federal courts to assist it in that proceeding. This is the, this is the standard U.S. point of view about discovery that it's better that the facts come out and the court decide something on the issue of truthfulness.

THE COURT: At least with respect to those portions of the record that were received in evidence in the Alabama case, doesn't that court's protective order play a fairly significant role in this?

MR. LYNCH: I think that court's protective order—I think we did have the option, Your Honor, to go to Alabama and ask the court to unseal those documents as being inappropriate and that may be something that we would end up doing. Our, our theory in bringing, in coming to this court

was that we read section 1782 as giving us a broader right than, than just a right to the documents in the public domain and that, and that, you know, by standard venue principles this is the correct court. Both companies are headquartered in this district.

THE COURT: I appreciate that.

MR. LYNCH: So, so it, it is true, Your Honor, that if we were asking to unseal the record in Alabama I think the only appropriate place to do that would be in Alabama. These are documents in Intel's possession and they're documents that were at all times discoverable by any federal court.

The Alabama protective order does not by any federal principle have the effect of tying the hands of any subsequent federal judge in deciding what the, what the appropriate scope of discovery is in that particular proceeding before him. So we, we have, we have come asking this court for its help in getting the whole population of documents that were produced. We don't—we clearly don't have any interest in the patent side of that case and we're quite willing to work with Intel to avoid having them dump on us a massive amount of irrelevant material.

THE COURT: According to counsel's calculation only 2 out of 33 claims have any antitrust significance in that case.

MR. LYNCH: As I'm sure you recognize, Your Honor, a brief antitrust allegation can result in an awful lot of documents and an extensive allegation of a different kind may not produce a lot of discovery.

What we're—I mean, clearly we would not have any interest in, in,—we're certainly not interested in Intel's business secrets. The only thing we're interested in is the secret arrangements for business dealings and the secret arrangements to exclude AMD for competition and the secret arrangements that to set standards that AMD can't share in. How they build their processors is not a concern to us. We build, you know, a different processor which is based on a, on a complying with the same instruction set but having different internals.

So, so the concept that we're somehow interested in looking at Intel's business secrets other than the secrets that pertain to violating the competition laws is a straw man.

So, Your Honor, to sum up, it's been argued that the EC is not a tribunal. I think we have shown that the intent of Congress was not to impose on other governments our exact form of administrative bodies but to make discovery available for people preceding before the tribunal set up in the exercise of their sovereignty. And the Commission is clearly the tribunal like AMD must go to get it under relief under the competition courts. So we had to go to the commission to get relief.

We're an interested person under the European standards and we're the complainant and the party being injured by this conduct. I think there has to be reciprocity of discovery. Clearly there is a split in the circuit cases on that issue. The more recent cases the second circuit in—I'm sorry, the Third Circuit in *Bare* (phonetic) and the second circuit in *Jenollo* (phonetic) I think have clearly set a trend to reject the early cases that impose that requirement but all I can say is that there's a trend and there's a split in the case and I think the reasoning of these more recent cases is clearly the objective of Congress.

Thank you, Your Honor.

THE COURT: Thank you, sir.

MR. COOPER: I'm Bob Cooper, Your Honor.

THE COURT: Yes, Mr. Cooper.

MR. COOPER: Let me start, I think, by talking about what may be the most important decision that we have supplied to Your Honor. It's also very lengthy. It's the *XO Chemy* case. That's a decision by the highest court in the European Community. It's written by advocate general lens. That case makes several propositions very clear. The first is that a complainant before the EC is, to use the court's exact words, "limited to a role which corresponds to the position under criminal procedure of a person who reports a matter to the authorities."

Now, it's true, as Mr. Lynch says, that they can submit evidence just like someone who goes to a local prosecutor and says someone who committed a crime can submit whatever he has but basically the EC body of law as elaborated by the top court, the advocate general, is that they are limited to a role which corresponds to the person who goes to the police or goes to the prosecutor.

They have no discovery rights. There's no issue about that. And they may not, and this is perhaps the most important point, they may not in any circumstances be given access to confidential documents of an undertaking, another company, a competitor. That is an iron clad rule that the EC adheres to.

Now, there's a lot of law here that I would like to address some of it and deal with it but that overriding concern, no matter where we go, I think ultimately ends this whole issue in this court because it is clear that if the relief that, that AMD is asking for is granted, that would be an affront to the very principles that the EC wants to further in its proceedings.

It does not want a situation where a company by merely filing a complaint with the EC can then go somewhere and gain access to a competitor's secrets. It would never permit that in the EC. This is not just a matter of the EC doesn't have a discovery procedure. This is a matter of, of a concern that the EC has which transcends that whole concept.

The last thing that the EC wants, and it's clear from this opinion, is to encourage people to file complaints which can then be used as a device to gain discovery against a competitor.

Now, the EC has plenary power to seek material from those people they are investigating. And I should make it clear that in the case of, in our case, we have responded to those requests. We're only in a preinvestigation stage as I think we made clear in our papers. We're not even to the investigation stage. We have responded to the requests and, and there is no issue that, that, that Intel will produce what-

ever the Commission asks them to produce, whether it's in the United States or abroad.

So what we have here, if you were to grant this motion, you would be not only breaking new ground, you would be really creating a principle that would have I think a profoundly bad effect in terms of the Commission because anybody who wants access to the documents of a competitor files a complaint with the Commission and has immediate access. You can't do that here in front of the FTC. You can't go to the Department of Justice and file a complaint and get access to the accused documents.

So, so that is a problem. And it is a problem which will multiply because if it's the case that AMD by merely filing the complaint in front of the EC can now come to you and ask us to discard all of the documents that might be relevant in their complaint—by the way, that's not what they have asked for but I'm going to come back to that—if they could do that because they somehow qualify under the statute, which they don't, then clearly we can do that because we are the party being investigated. We can go to AMD and get all of their documents and the end result of that is going to be United States courts are going to become an international referee of discovery disputes as least if there's not any American company involved. There's on an annual basis 300 to 500 complaints that the EC investigates every year and a large number of those involve American companies. So there's a potentially disruptive problem here and that's why, that's why I think the court would be very ill-advised to consider the type of motion that AMD is making at this point.

Now, fortunately the law is quite clear about the amount of hurdles that an interested party must surmount to get this discovery and AMD cannot surmount them. They can't surmount them on the first level which is they don't qualify under the statute and they can't qualify on the second level and even if they qualified, which they don't, they can't surmount them in that this is a discretionary motion and the court must look at considerations exactly of the sort that I was just talking about. What is the policy of the EC?

And what do they want to achieve? And where are they going with their policies?

I heard Mr. Lynch say that some of these documents are in the summary judgment motion. I'm not all together clear what he's saying. It is absolutely clear to me that if any of these documents that he wants are in the public domain, he's got them. He didn't give them to the EC. I don't believe what he wants is in the public domain and if he wants to try to open up that which was protected by another court in Alabama his obligation is to go to that court and ask that court to open it up, not to come here and make an end run.

Let me talk about that end run for just a minute. This is not an end run that he's giving you a request for documents that is finely tuned to the issues that they are complaining about abroad. To the contrary. They have come in and said we want everything that you have provided on these disks in the *Intergraph* case.

That fails another test because the law is absolutely clear that if you proceed under 1782, seeking discovery in the United States and, and for the purpose of a foreign jurisdiction and if the foreign jurisdiction does not permit discovery and doesn't have any rules as to that discovery, then the federal rules of civil procedure apply. So in one sense you can cut this off real fast because AMD has not complied with the rules and given you a targeted specific request. They have given you a blunderbuss request.

Now, there's some 600,000 documents that are covered by their request and almost all of which would have nothing to do with anything abroad. They're not organized by request. They're organized as they were in the files. It's simply an improper request and that would be basis alone for Your Honor to deny this motion.

Having said all of that, let me spend a moment and talk about the key principles here because I do think they're dispositive.

We start off first with the proposition that the law requires that a party, particularly a private party who seeks documents here in the United States for use abroad, it must

be for use abroad in a tribunal that performs an adjudicatory function.

If you look to the legislative history you'll see repeatedly that the emphasis is on a tribunal, it be an administrative tribunal or quasi judicial tribunal or a court it must perform a function. AMD relies on the commentator, a reporter who recommended the change in the law, Mr. Smith. He's been all over the place on a lot of these issues but Mr. Smith is a commentator. He's not Congress, and he's not the courts and when you go through our brief I think you will see that the courts have long since Mr. Smith have made it clear what the requirements were for one to require as a tribunal abroad and those requirements are pretty clear. It must be an adjudicative tribunal.

Now, what does that mean? It's clear that that means that you have to have a separation of functions. You cannot have a person being the investigator, a prosecutor and a decision-maker all wrapped up in one, but that's what the EC is.

Secondly, you must have a proceeding where there are adversary parties. Well, this is not a proceeding where there are adversary parties. There are no rights for one to look at the other's documents. In fact, you have no right to compel a witness to appear and testify. There are no rules of evidence as we know them. There's no right of cross-examination. I mean, this is an agency that is investigating something, and indeed, we're only at the preinvestigative stage at that.

And so the first problem they have is that they cannot show that the EC is within that group of tribunals, the international tribunals that is contemplated in 1782. And I don't want to waste your time on stuff that is in the brief, but I would point out to you when you look at the material in the brief you're first going to find the view of the EC and here's what they say, I'm going to quote: "the Commission's procedure is administrative and not judicial. It must not be turned into a trial."

THE COURT: That was their 11th report?

MR. COOPER: Very good. You're ahead of me on that.

And I thought that's very important and that describes how they envision their process.

And then we, of course, have the top court, the Court of Justice saying that the EC doesn't conduct adversarial proceedings between a complainant and the undertaking counsel, counsel for the company.

And we even have the English court that looked at this whole thing and said that this is better labeled as an administrative rather than a judicial or quasi judicial proceeding. So we just don't have the type of proceeding that is contemplated by 1782.

The analogy to the FTC which runs through AMD's papers is way off the mark and I'm sure Your Honor is familiar with this over the years but when I go through the FTC, if they file a complaint, we get an independent hearing examiner who has nothing to do with that and the Commission which makes the ultimate decision cannot have any ex parte contact with the lawyers. And, and the plaintiff's counsel is represented by a group from the FTC who cannot have any contact with the—

THE COURT: It's very much different than—

MR. COOPER: Very much so. And that would qualify as an agency with an adjudicative function.

THE COURT: Yes.

MR. COOPER: We don't have that here. So you have a situation where it is not an adjudicative body. It is akin to and if there was any one case that I think is most significant in this regard it's probably the case of Judge Friendly in the case with the Inspector of India.

THE COURT: Yeah.

MR. COOPER: In that case he was looking at an Indian tax inspector. Now, this Indian tax inspector had full power to assess tax liability so in that sense it's like the EC which has the power to issue an order and enforcing what he believes the law is and Judge Friendly held that's not a tribunal as contemplated by 1782 and he went on to make an

analogy to our own I.R.S. and said that's not a tribunal either and Congress would be stunned were they to learn that 1782 contemplated that something like the I.R.S. could be a tribunal.

So I think that lays out the law and, and as a practical matter AMD can't get out of the starting block here because they can't qualify.

Having said that I don't think I need to spend much time on the concept of whether they are an interested person.

THE COURT: Uh-huh.

MR. COOPER: I would like to point out, however, if as you work through that body of law, it is very clear that to be a private party and qualify as an interested person, you have to be a litigant in the adjudicative proceeding abroad.

Now, there may be circumstances where an agency, a government agency can qualify as an interested person but a private litigant must indeed be a litigant but an interested party, a person has to be a litigant if it's a private party. So we have found no case and we do not believe there's any case where any court here has ordered discovery under 1782 because where you had a private party that was not a litigant in an adjudicative proceeding and come back to documents—and I know I'm back to my old tricks and I see the court reporter looking at me suggesting I slow down.

The last point I would like to emphasize here is AMD cannot obtain discovery in this case because under 1782 it has no right to discovery.

I touched on that briefly and Mr. Lynch makes the point and it's clearly right that there's a split of authority and that there's a threshold of authority and but I would mention that the split runs in our favor at this time. And I believe the courts which impose that requirement is the better reasoning and is persuasive, but you know, it doesn't really matter here because all of those courts end up, even the courts that say there is no absolute threshold requirement, they all turn around and say but in your discretion you should take a look at the issue. And I think that, that whether you call it an

absolute threshold requirement or whether you simply say I'm going to exercise my discretion, it seems clear to me where the EC does not under any circumstance ever want a complaining party to get access to secrets of another company just by complaining that that discretion should be exercised in favor of denying the motion here.

THE COURT: Thank you, Mr. Cooper.

MR. LYNCH: I would like to start on the point in which Mr. Cooper closed and there's a discrepancy between the position Intel takes here. He would present this to you as to each and every document covered by our demand is within the framework of European law, so-called business secret. If you have read the *XO* case which he cited, and by the way the advocate general does not announce the decision. The language of the advocate general is nothing more than a friend of the court brief. It doesn't constitute the holding of the European Court of Justice but if you read the *XO* decision you'll see that the Court of Justice held, one, that a party in the position of AMD does have a right of access to documents produced by the respondent; two, that that right mitigates the protection of the so-called secrets; and three, as Mr. Cooper said, and correctly, that the one thing that there is no discretion in the commission to do is to turn over to, to AMD or a complaining party something called a business secret of the respondent.

That business secret is a narrowly defined term and the court says that it is the duty of the commission to go through the documents and separately and make an informed decision in each case whether or not the business secret protection. You simply just can't waive your hands and say you're asking for my documents ipso facto. They're business secrets and ipso facto they're restrained business secrets.

Moreover there's nothing in European law to suggest that the European courts have an objection in policy to the receipt of documents which have been obtained in accordance with the laws of the jurisdiction where the parties come from and so in this context the United States has developed a process for dealing with business secrets and we

have 60 years of secrets with it and those 60 years of experience indicate that they're business secrets and there isn't a single case that I'm aware of where a party to the litigation has been accused of producing documents, producing documents to design a new document. There's been abuse of protective orders certainly but not of the kind.

And the notion that an American company would go to Europe and file a complaint with the European Commission in order to get discovery that it could easily get in a lawsuit in the United States, that claim, that risk doesn't exist.

So insofar as Your Honor may believe that as a matter of discretion or as a matter of commodity there's some concern about business secrets, then I agree that Mr. Cooper is correct, we should look at the Federal Rules of Civil Procedure, what do they say in that case? They say that it's Intel's burden to tell the court in a particularized way which documents we have asked for involve business secrets that are truly entitled to protection and maybe those ought to be carved out of the demand but it is our, our rules of procedure say, say that if you want a protective order for discoverable material and you're entitled to do it on the ground that trade secrets are involved, then you have to make a showing that that indeed is true. We're not entitled to simply say, there is somewhere in this mass of documents a business secret or two, and therefore, you can't have any of them.

Secondly, I would like to point out something else that Mr. Cooper said and which is indicative of the problem that AMD faces here. He says that these documents, they're 600,000 of these documents and they're not organized by request. They are—they were produced in the manner that they exist in the Intel file. So there's no way, he says, for Intel to go into that body of documents and identify by request which of the documents respond to requests of a, particular antitrust nature. And the same is true for us, the same was true for us. Our choice was either to, either to go without the documents or to ask for and there's plenty of federal authority that it's appropriate, it's an appropriate call and a document demand to define the demand by docu-

ments produced to the government and documents produced in other litigation.

So we come down again to sort of this fundamental question. The first question is is AMD entitled to any relief under section 1782 of the Judicial Code? The question is not whether there are some documents which as a matter of discretion shouldn't be produced. The question is not whether Intel couldn't on an appropriate showing exclude some documents, the question is whether AMD is entitled to any relief and as the second circuit said in the *Bare* case, the correct way to resolve that issue is to limit the order granting relief in a way that properly defines what can and can't be taken, not an outright denial of all relief.

So on that question, first of all, the contention that the European Commission is not a tribunal, you know, it was hard for me to follow the dialogue or the colloquy between yourself and Mr. Cooper but basically I think the fundamental point here is this: Congress clearly did not mandate that other governments around the world have to devise tribunals that correspond to the U.S. constitutional concept of powers. Congress did not say that the countries of Western Europe have to adopt our system of judicial, judicial, judicial, judicial legislative and any other tribunal that doesn't have that separation in powers we won't recognize and we won't give respect to.

It is true that the European Commission is not the same as the FTC. It is also true that it is not anywhere like the Internal Revenue Service.

It has very specific and they are, they are in the, in attachment—excuse me, Your Honor, attachment 5 to Dr. Par's declaration contains the regulations setting out the procedural rules which the commission follows in connection with a, with a, a third party complainant, a third party like AMD.

And you will see as you go through those rules, Your Honor, that they very clearly confer obligations on the Commission to receive and, and neutrally and independently

evaluate the evidence submitted by both the complainant and by the respondent.

In U.S. administrative law, in the -- and the only real Ninth Circuit cases that talk to 1728, the court says that 1782, 17 rather, 1782 is meant to make available discovery aid in the case of administrative or, or quasi judicial bodies. It's, it's not limited to, to administrative agencies that fit the U.S. pattern.

When we talk about quasi judicial in an administrative law context in the United States, we define quasi judicial as involving, as involving an administrative agency taking particularized evidence about the facts of a specific case and making an adjudication about that case. We distinguish that from policy making where you have hearings that are for the purpose of quasi legislative activities establishing regulations. There's no question if you look at section 4820 that the European Commission acts in a quasi judicial fashion when it is presented with a complaint that an individual company has violated in effect the European antitrust laws.

It weighs the evidence, it applies the specific evidence to the facts of that case, it speaks retrospectively. It doesn't announce rules that apply outside of the case except by a stare decisis kind of concept. It acts in every way in a quasi judicial fashion.

It is true that the Europeans have concluded that our system of having administrative law judges is not their cup of tea, but it's an abuse of the whole, of the whole spirit of international commodity to say that the United States would not aid your tribunals unless they follow the Jeffersonian and separation of powers.

Likewise to say that we're not an interested person when regulation 2842 clearly gives us rights to be heard and to take any action adverse to us that the commission arrives at and have that judicially reviewed by the Court of First Instance and if we're not happy in the Court of First Instance by the European Court of Justice. We have direct appeal rights. That appeal process is very similar to federal judicial review of administrative agencies in this country.

So what we have here is a situation where the European Commission is a European entity that follows European concepts of governmental structure. It is not, it is not a clone of the Federal Trade Commission or a clone of any other, any other body of the United States or anyone else.

THE COURT: Does the rule of the court of first instance strictly an appellate rule within this area?

MR. LYNCH: Your Honor, my understanding is insofar as it reviews actions of the European Commission it would be the equivalent of an action brought in the district court to challenge the sufficiency, for example, of compliance with Administrative Procedure Act.

The court, the court considers itself limited to a determination of whether the Commission followed its regulations. It has limited power to disagree with the Commission on the substance of the law but it doesn't retry the case de novo. It acts on the record made in the European Commission.

THE COURT: Can you have whatever they call the, call the equivalent of the judgment solely on the basis of a determination of the commission or does there have to be some—in every case some sort of determination by the court of first instance?

MR. LYNCH: My understanding, Your Honor, I don't hold myself out as an expert but my understanding of the process is that if the Commission, and let me just take an example of our complaint, if the Commission found that Intel had engaged in practices which abused a dominant position, it could order Intel, for example, to cease exclusive dealing arrangements. Intel would have the option to appeal that order.

THE COURT: I see.

MR. LYNCH: But it wouldn't have an obligation to appeal that order and the order would not be executing if it did not appeal it and the Commission can impose penalties and other sanctions in addition to giving what we would call injunctive relief.

So as I say, Your Honor, what we're talking about here is kind of a bifurcated question. The big question before you is whether the federal courts recognize that an American company seeking relief in the only tribunal that exists in Europe to give us relief for violation of the competition laws, whether we can come to federal court and get the discovery help that the Congress intended that we should have.

Whether there are parts of our demand which ought to result in protection is the second step in the process and I agree with counsel for Intel that when we talk about that part of the process, we should look to the federal rules. And we should follow—apply the federal rules by analogy and, and if Intel, in fact, has business secrets, that would be recognized and upheld by the Commission then they should be entitled to the production of particular parts of the documents and we should be able to challenge whether that showing is sufficient or not and meet and confer and have the usual process that goes on in U.S. discovery but for Mr. Cooper to ask Your Honor to sweep aside the whole request for relief because there may be some, some limited number of business secrets in this, in this batch of documents, that, Your Honor, I would believe would be to throw out the baby with the bath water.

I think the Second Circuit suggested exactly the right procedure which is, which is grant the relief but in the order limit it as the court feels is appropriate and, and AMD recognizes that from the outside looking in it's possible that there are areas which, for expediency sake and burden sake ought to be carved out of our request, and we have said all along we're perfectly willing to meet and confer with Intel about that.

Intel has not offered to look for that kind of solution. They would like Your Honor to let them stonewall us so that we are—so our hands are tied in trying to show what we considered to be a very serious violation of our ability to compete in Europe in an important market. With important connotations for the United States as well as Europe.

Thank you, Your Honor.

THE COURT: Thank you, sir. Anything further, Mr. Cooper? And Mr. Lynch can reply to anything else you would like to say?

MR. COOPER: I have a few points that may be helpful. I thought it might be useful to try to explain my understanding of the Court of First Instance.

Basically what happens is that when you get to the Court of First Instance and, for example, we're now in a pre-investigation stage. If, if the EC were to decide to issue a statement of objections and actually start a formal investigation, we would then go through that process and then if they were to conclude that there was a violation and issue an order to cease and desist, Intel would have the right to go to the court of first instance, which is a mix of appellate and original jurisdiction, but I think what distinguishes that court at least the way I look at it is that when you get to that court you suddenly have a disinterested tribunal and you have parties in front of that court, you have Intel and you have on the other hand the EC staff arguing where they're right.

So that's, that's the stage at which we move to something that looks like an adjudicative process and that is two stages removed from where we are now.

Mr. Lynch made a big point that the EC has these rules that say that it must act fairly. I would ask you to look at *Inspector of India* where Judge Friendly—as a matter of fact, let me get it. It addresses that very issue. That was the argument that was made there to support the proposition to—that in that case the Indian tax collector which is supposed to act fairly, should, should be viewed as a tribunal and Judge Friendly says, using the I.R.S. analogy, neither do we believe that most congressmen would regard the appellate division of the service, that's the I.R.S. as a tribunal although the pertinent regulations speak of proceedings and require the conferee to determine the correct amount of the tax with strict impartiality between the taxpayer and the governor. Granted that regulations are major officials to act fairly. They remain tax collectors and not adjudicators.

They do not have and they are not supposed to have the complete objectivity normally associated with a tribunal. So that's really the key issue here and what we have is a body of law that has developed which is quite strong that makes it clear that when you have a, a person which is just a private party coming to the court here saying I would like to have discovery in connection with a matter proceeding in a tribunal abroad, you have to show that it is an adjudicated tribunal and that's simply the task, they can't get past that test here so that should end the issue.

And it is a good test because otherwise you do open up our courts to endless discovery disputes because this will be the jurisdiction where everybody will come to get massive discovery because we permit massive discovery and most other jurisdictions don't in this world.

The advocate general as I understand it when we're talking about the *XO Chemy* case. My understanding is that the advocate general is part of the staff of the court. And the court makes a decision and the advocate general's job is to explain the rationale behind that decision so what you have there is the rationale behind the decision of the highest court of the European Union. And the advocate general participates on the court and writes that decision and so that's what we look to when we look to a body of precedent that emanates from the EC.

With respect to this whole issue of what documents are properly secret and what documents are not, that's an issue that is really way down the road because I don't think that Your Honor should reach that issue. There are multiple reasons why this discovery should not go forward at all but it is clearly the case that it's not our obligation to have to go through something that was done for another case which involves almost entirely different issues and massive discovery and sort through all of that which is irrelevant in large part if not entirely to the issues that AMD is raising and then sort out what are business secrets and what are not business secrets and there's something backwards about that.

If you reach the point where you think they have some rights under 1782, which I don't think they do, still it seems to me the proper course of action here is to dismiss this because this was improperly put. They have to go back to the drawing boards.

THE COURT: Thank you, sir.

Mr. Lynch, anything further?

MR. LYNCH: I think that if you, I think that Mr. Cooper would agree with me at the end of the day that the advocate general is more like the solicitor general here than a spokesman for the court but it really doesn't matter because it's certainly true that in that case the European Court of Justice held that business secrets are protected and what the point I want to make is that the court doesn't take just a blunderbuss assumption that everything is.

THE COURT: Well, yeah. I thank you gentlemen for your good arguments and I wish you a happy holiday season.

(Whereupon, the proceedings in this matter were concluded.)

CERTIFICATE OF REPORTER

I, the undersigned official court reporter of the United States District Court for the Northern District of California, 280 South First Street, San Jose, California, do hereby certify:

That the foregoing transcript, certificate, inclusive, constituted a true, full and correct transcript of my shorthand notes taken as such official court reporter of the proceedings hereinbefore entitled and reduced by computer-aided transcription to the best of my ability.

/s/ IRENE RODRIGUEZ
IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER CSR 8074